REPORTS

OF THE

BANTU APPEAL COURTS

1965 (1 & 2)

VERSLAE

VAN DIE

BANTOE-APPÈLHOWE

THE GOVERNMENT PRINTER, PRETORIA.
DIE STAATSDRUKKER, PRETORIA.
G.P.-S.6909713—1965-66—700.

Case Index
Bladwyser van Sake
1965 (1 & 2)

6909713—6

Index of Subject Matter

Inhoudsopgawe

1965 (1 & 2)

PAGE.
BLADSY.

VERSLAE

VAN DIE

BANTOE-APPÈLHOWE

1965

REPORTS

OF THE

BANTU APPEAL COURTS

DIE STAATSDRUKKER, PRETORIA.
THE GOVERNMENT PRINTER, PRETORIA.
G.P.-S.7470465—1965-66—700.

AMPTENARE VAN DIE BANTOE-APPÈLHOWE, 1965.
OFFICERS OF THE BANTU APPEAL COURTS, 1965.

SENTRALE BANTOE-APPÈLHOF.
CENTRAL BANTU APPEAL COURT.

VOORSITTER/PRESIDENT: R. S. G. GOLD.
PERMANENTE LID/PERMANENT MEMBER: J. R. THORPE.

NOORD-OOSTELIKE BANTOE-APPÈLHOF.
NORTH-EASTERN BANTU APPEAL COURT.

VOORSITTER/PRESIDENT: J. P. COWAN. 1/1/1965–31/8/1965
VOORSITTER/PRESIDENT: E. J. H. YATES. 1/9/1965–31/12/1965.
PERMANENTE LID/PERMANENT MEMBER: R. M. CRAIG.

SUIDELIKE BANTOE-APPÈLHOF.
SOUTHERN BANTU APPEAL COURT.

VOORSITTER/PRESIDENT: N. P. J. O'CONNELL.
PERMANENTE LID/PERMANENT MEMBER: E. J. H. YATES, 1/1/1965–31/8/1965.
PERMANENTE LID/PERMANENT MEMBER: H. J. POTGIETER, 1/9/1965–31/12/1965.

7470465—5

Bladwyser van Sake Case Index 1965.

Inhoudsopgawe
Index of Subject Matter
1965.

SOUTHERN BANTU APPEAL COURT.

ROQOZA vs. ROQOZA.

CASE No. 44/64.

KING WILLIAM'S TOWN: 16th February, 1965. Before O'Connell, President, Yates and Leppan, Members of the Court.

BREACH OF PROMISE.

Plaintiff must prove that any patrimonial loss suffered is due to the breach—loss of earnings before breach not to be taken into account. All surrounding circumstances to be considered in assessing general damages suffered as result of the breach.

Summary: The plaintiff, a spinster, was rendered pregnant by the defendant in May, 1957. At the suggestion of the defendant, the parties went through a form of marriage in a church on the 3rd August, 1957, but parted company after the ceremony and did not live together as man and wife thereafter. In 1962 the defendant ascertained that the Minister who officiated at the ceremony in August, 1957, was not a marriage officer. He conveyed this information to the plaintiff's attorney in December, 1962, and on the 2nd Jauary, 1963, married another woman.

On a claim by the plaintiff for R1,000 as damages for breach of promise, the Bantu Affairs Commissioner awarded an amount of R400 made up as to R264 in respect of loss of earnings and R136 general damages.

Held: That as the breach occurred on the 2nd January, 1963, the Bantu Affairs Commissioner erred in taking into account loss of earnings suffered before that date.

Held further: That in all the circumstances the award of R136 as general damages was excessive.

Appeal from the Court of the Bantu Affairs Commissioner, King William's Town.

O'Connell, President:

The defendant has noted an appeal against that portion of the judgment of the court *a quo* ordering him to pay to the plaintiff the sum of R400 as damages for breach of promise to marry. The grounds, as set out in his notice of appeal, are:—

(*a*) That the damages awarded are excessive in the circumstances.

(*b*) That the learned Bantu Commissioner erred in not taking into consideration the 7 (seven) head of cattle paid by Appellant as dowry,

but Mr. Anderson, who appeared before us on behalf of the defendant, abandoned ground (*b*).

In May, 1957, the plaintiff, a spinster, was rendered pregnant by the defendant. At the suggestion of the defendant, the parties went through a form of marriage in a church at East London on the 3rd August, 1957, and immediately after the ceremony parted company and returned to their respective teaching posts in the King William's Town district. At no time thereafter did they share a common home or cohabit as man and wife.

In January, 1958, the plaintiff gave birth to the defendant's child in the hospital at Middledrift. The defendant paid the lying-in expenses and took the plaintiff and the child to her people. During 1962 the defendant wished to institute proceedings for divorce and then ascertained that the minister who officiated at the marriage ceremony on the 3rd August, 1957, was not a marriage officer and that his marriage to the plaintiff was therefore null and void. He conveyed this information to the plaintiff's attorney on the 13th December, 1962, and on the 2nd January, 1963, married another woman.

In his able argument before us Mr. Anderson pointed out that the summons itself claimed that the breach occurred on the 2nd January, 1963, and that it was to that date that the court *a quo* should have had regard in assessing the damage, if any, suffered by the plaintiff. He contended, therefore, that the Bantu Affairs Commissioner had erred in taking into account loss of earnings suffered before that date and that, in any event, such loss was occasioned not by the breach of promise to marry but through the plaintiff's pregnancy following upon her seduction by the defendant. In respect to the clothes and the furniture the plaintiff alleged she purchased as a result of the marriage, he argued that no loss had been proved because the plaintiff admitted she had used the clothing and was still using the furniture. In his submission, the plaintiff had failed to prove any patrimonial loss as a result of the breach. This Court is in accord with these contentions.

Turning to the question of the sentimental damages, it must be pointed out that the marriage, though regarded as binding by the parties, was one only in name. There is no evidence on record to establish the contention that the plaintiff held an elevated position in the community by virtue of her marriage to the defendant; on the contrary, her relatives, called as witnesses by her, state they do not know the defendant though they are aware of the fact that she had married some person. For these reasons, this Court cannot agree with the statement in his reasons for judgment by the Bantu Affairs Commissioner that the plaintiff had for five years enjoyed the status of the wife of a Principal Teacher.

Mr. Anderson conceded that the defendant could have had the "marriage" validated and that his failure to do so constituted a breach of his promise to marry the plaintiff but argued that, having regard to all the circumstances of the case, the plaintiff had suffered only minimal damages.

As has already been indicated, this Court finds that the Bantu Affairs Commissioner erred in taking into account loss of earnings amounting to R264 in assessing the damages suffered by the plaintiff. Having regard to all the circumstances, this Court feels also that the award of R136 (R400 less R264) as general damages is excessive and that justice would be done between the parties by an award of R50 as damages to the plaintiff.

In the result, the appeal is allowed with costs and paragraph (*a*) of the judgment of the court *a quo* is altered to read: "For plaintiff in the sum of R50 for breach of promise".

Yates and Leppan, Members, concurred.

For Appellant: M. Anderson (Hutton and Cook).

For Respondent: R. Radue (Barnes and Ross).

SOUTHERN BANTU APPEAL COURT.

MABIZELA vs. MBOLEKWA d.a.

CASE No. 11 OF 1964.

KING WILLIAM'S TOWN: 7th June, 1965. Before N. P. J. O'Connell, President. Yates and Moll, Members of the Court.

NATIVE CASES.

Municipal Location. Action for delivery and transfer of hut site and improvements in Municipal location of East London, alternatively, payment of its current value and loss of rentals. Property registered in name of unmarried daughter (defendant) with object of evading Municipal regulations. Property subsequently sold but defendant refused to sign transfer papers. Action to enforce delivery failed but doctrine of undue enrichment applied and Plaintiff succeeded on alternative claim.

Summary: In order to evade the provisions of the Municipal Regulations plaintiff registered a hut site with a building thereon in the name of his unmarried daughter (defendant). He subsequently sold the property to a third party but defendant refused to sign the transfer papers. Plaintiff instituted action for delivery and transfer of the hut site and improvements and, alternatively, for payment of its current value and loss of rental. The action to enforce delivery failed.

Held: That although the property was registered in Defendant's name, she had no right to it. Plaintiff, however, could not compel her to sign the necessary documents and she was therefore obviously enriched at his expense.

Appeal from the Court of the Bantu Affairs Commissioner, East London.

Yates (Permanent Member):

This is the second time that this matter has been before this Court. Originally the plaintiff (present appellant) sued the defendant (present respondent) for (*a*) a declaration that the improvements situate on hut site 775 Vimbi Street, Duncan Village, East London, are his property; (*b*) an order against the Defendant requiring her to sign all documents and do all things necessary to enable the Municipality of the City of East London to effect transfer into the name of any buyer approved of by the plaintiff, and (*c*) alternatively, payment by the defendant of the sum of R1,200 being the extent to which she is enriched at the expense of the plaintiff; the plaintiff tendering to the defendant all rentals received by or due to him on the said property as and from the date of judgment. It was averred in the summons that the plaintiff had on or about the 4th February, 1956, purchased the said improvements from the estate of his late father for the sum of R300 but that, because at the time of the purchase he was the registered owner of another property in the location, he was, in terms of the location regulations, unable to take transfer of the estate property and it was then agreed verbally between the parties that the defendant, who was still unmarried, was to take transfer of the property but that the plaintiff would remain the recognised owner and would also collect all rentals due and accruing from the property. The summons goes on to say that the property was, in terms of the agreement, transferred to the defendant and that since the transfer the plaintiff has collected and appropriated to his own use all rentals from the property, save those from the month of August, 1962, which

the defendant has misappropriated without the plaintiff's knowledge and consent and that the defendant now refuses to sign the necessary papers to effect transfer of the property to a buyer approved of by the plaintiff and claims the all in right, title and interest in and to the said improvements as her own property.

The defendant, in reply to the summons, filed two special pleas, the first to the effect that the summons disclosed no cause of action in that the improvements on the hut site in question were the property of the Municipality because it was the owner of the ground, and the second that the plaintiff's claim and his alternative claim are prescribed. In addition, she pleaded over that it was she, and not the plaintiff, who had purchased the improvements, that she had not entered into the agreement averred by the plaintiff and that she held the property in her own name and not on behalf of the plaintiff. She admits that the plaintiff collected the rentals but states they were kept by the plaintiff, who was to account to her for them. She also admits that she refused to sign the necessary papers to pass transfer and that she claimed the improvements as her own property, but she denies that there is anything wrongful or unlawful in such actions on her part. The defendant also filed a counterclaim for payment of the sum of R1,326 in respect of the rentals collected by the plaintiff for the period 4th February, 1956, to 31st July, 1962, at R17 a month. To this the plaintiff pleaded over that he and not the defendant is the owner of the property and that, therefore, he is under no obligation to account to her for the rentals collected by him; alternatively should the Court find the rentals are in fact due and payable by him to the defendant, that such monies as were due for the period 1956 to 1959, inclusive, are prescribed.

The Bantu Affairs Commissioner dismissed the claim with costs and granted judgment on the counterclaim to defendant for R554.40 being the rent for the period August, 1959, to July, 1962, i.e. R612 less R57.60 being site rent paid by plaintiff during that period.

On appeal his judgment was set aside for the reason that prescription, on which he relied, did not obtain and the case was returned for hearing to a conclusion. After hearing evidence the Bantu Affairs Commissioner dismissed the claim and the alternative claim, with costs, the counterclaim having been withdrawn by the defendant.

The plaintiff has now appealed against this judgment and Mr. Anderson, who appeared on his behalf, confined his argument to the ground that the judgment was against the weight of evidence and the probabilities of the case.

The Commissioner has stated in his reasons for judgment that his decision in regard to the alternative claim is based on fact but whereas he finds as proven that defendant engineered the so-called " sales " of three properties to different persons in order to retain them, in contravention of the Municipal Regulations and that defendant was the nominal owner only in the case of the property here in question, later in his reasons he stated that there was a strong likelihood that defendant's account of how she acquired the property, i.e. that she had tendered for the purchase and obtained R300 from her savings from her father to pay therefore, was correct.

Mr. Cohen, who appeared on behalf of the defendant, argued that the plaintiff had not disharged the onus which rested on him of proving that defendant was merely a substitute in the transaction. He pointed out several weaknesses in plaitiff's case, viz., the failure to elicit from the witness, Abel Ntongana, any evidence as to the alleged agreement between plaintiff and defendant, plaintiff having averred in his further particulars and

in his evidence that all three were present when the agreement of substitution was made. It is indeed strange that no questions on this point were directed to the witness who, however, substantiated plaintiff's statement that he had acted as a substitute in the transfer of another property purchased at the same time as the one forming the subject of the present litigation.

Mr. Cohen also argued that the letter written by defendant's husband in which he stated that he was not prepared to buy a house of plaintiff's and suggested that plaintiff had better sell it to some other person who wanted it, was not corroborative of plaintiff's evidence that it related to the property in question but to another property; but that it did refer to any other property is unlikely bearing in mind that there is no evidence that at that stage plaintiff contemplated selling any other property than 775, Vimbi Street. According to plaintiff, it was only when defendant refused to buy this property—and her husband's letter is dated the 12th January, 1962—that he decided to try to sell to someone else and this is borne out by defendant's refusal to sign the document of sale in August, 1962. According to plaintiff's uncontroverted evidence he only sold the Coote Street property in 1963.

Mr. Cohen also criticised the failure to call the other substitute purchaser, i.e. Rosy, but in this connection it must be pointed out that the woman, Selina, deposed to having purchased the property registered in the name of Rosy from the plaintiff. Here it should be remembered that defendant averred that she had tendered for the purchase of the property and had paid the R300 to Mr. Schneider, her attorney, but she failed to call Mr. Schneider to corroborate this statement and no explanation was advanced by defendant why he was not called. She stands alone in this regard. It is also significant that plaintiff was not questioned regarding the alleged payment of R300 by the defendant to Mr. Schneider.

It is also strange that if defendant's story is true, the receipt for the payment made by her should have been in plaintiff's possession and why indeed if the property was hers, she should have exercised no control over it for six years and permitted plaintiff to deal with it as his own, to reap all the profits during that period and, further, that only when he wanted to sell it to another person did she claim it.

Receipts for the purchase of all three properties in plaintiff's late father's estate were issued by Messrs. Schneider and Cohen on the same day, viz., the 4th February, 1956, in the name of three separate people of whom the defendant was one. She admitted that the other two were substitutes and only nominal purchasers but contended that she had purchased 775 Vimbi Street with money handed by her to her father to save for her. However, that she had any such savings is most unlikely bearing in mind her contradictory evidence in this regard and the fact that she kept no account of what she had paid over and never, either before or after marriage, asked him to repay any other amount.

It is quite clear from the evidence of Abel Mtongana in whose name one of the three properties was registered and of Selina Jantolo, who bought one of the properties and Ross Sogoni, an Articled Clerk, that despite the fact that the properties were registered in other names it was the plaintiff who negotiated for the subsequent sale of all three.

The probabilities are strongly in favour of the plaintiff and in my view he has disharged the onus resting on him.

The plaintiff has based his present claim on the doctrine of undue enrichment and it is clear that although the property is registered in defendant's name, she has no right to it. Plaintiff, however, is unable to have the property transferred to him or to compel her to sign the necessary documents so that she has obviously been enriched at his expense. He paid R300 for the property but it is now worth R860, as is evidenced by Garanc's

willingness to buy at that price, as testified to by the plaintiff and the clerk, Sogoni. The plaintiff correctly assesses his loss in this regard at R860 which is the current value of the property. In addition the plaintiff has lost rent for the period August, 1962, to March, 1964, i.e. twenty months at R17 per month, as claimed in the summons and amplified by his evidence.

The appeal, therefore, is allowed, with costs, and the judgment of the Court *a quo* altered to read: "For plaintiff on the alternative claim for R1,200, and costs.".

O'Connell, President, and Moll, Member, concurred.

For Appellant: Mr. M. Anderson (Hutton and Cook).

For Respondent: Mr. H. Cohen (Schneider and Cohen).

NORTH-EASTERN BANTU APPEAL COURT.

MANYONI vs. KHUMALO.

B.A.C. CASE No. 67 OF 1964.

ESHOWE: 12th January, 1965. Before Cowan, President; Craig and Colenbrander, Members.

STATUTES.

Damage to crops—dispute regarding lawful occupation of lands concerned—allotments in a location—Proclamation No. 123 of 1931.

Summary: Plaintiff was awarded damages for destruction of crops on lands of which he alleged he was in lawful occupation. There was, however, a dispute in progress as to who was the legal occupier of such lands.

Held: That it was essential that the dispute be resolved before litigation regarding crops could be entertained.

Cases referred to:

Ngubane versus Ngubane, 1 N.A.C. (N.E.) 255.

Legislation referred to:

Proclamation No. 123 of 1931 section *three* (3).

Appeal from the Court of the Bantu Affairs Commissioner, Mtubatuba

Cowan, President:

This action had its inception in a Chief's court where the plaintiff, the present respondent, claimed sixty bags of mealies from the defendant (appellant) for ploughing his three fields for "three years and a half" without his permission. The defendant's reply to this claim was, "I did not plough the plaintiff's fields for the fields belong to me. The plaintiff demands my fields". The judgment of the Chief was, "I find the defendant guilty and I reduce the claim to R23 plus costs". The case was appealed to the Bantu Affairs Commissioner who confirmed the Chief's judgment.

The right to occupy the lands was claimed by both parties and the evidence adduced in this regard was conflicting. What does appear from the record, however, is that the dispute regarding the lands arose some years ago; that the plaintiff referred the matter to the Chief who made no decision on the point but referred the dispute to the Agricultural officer concerned and that this officer undertook to write to the Bantu Affairs Commissioner about it. It would seem that nothing further was done and that the matter was allowed to rest there until the present action was instituted.

The lands in dispute constituted in fact an "allotment" in a "location", as defined by Proclamation No. 123 of 1931, and the dispute between the parties as to which of them was in lawful occupation of the allotment fell to be decided in accordance with the provisions of section *three* (3) of that proclamation. This sub-section empowers a Chief, *inter alia*, to investigate and settle, administratively, disputes in connection with the occupation of allotments within the area of his jurisdiction subject to the right of appeal by the parties to the Bantu Affairs Commissioner and thereafter, if need be, to the Chief Bantu Affairs Commissioner whose decision shall be final.

As there was an existing dispute between the parties regarding the right to occupy the allotmet, it was essential that this should have been resolved in accordance with the provisions of section *three* (3) of the Proclamation before the plaintiff could succeed in his claim for damages for the wrongful ploughing of the land (see *Ngubane versus Ngubane* 1 N.A.C. (N.E.) 255 and the cases cited).

It follows that the Bantu Affairs Commissioner should have found that the plaintiff had failed to establish his case. The appeal is accordingly allowed and the judgment of the Bantu Affairs Commissioner is altered to read "The appeal is allowed and the Chief's judgment is altered to one of 'Claim dismissel'."

As the point on which the appeal was decided was taken by this court *suo motu* there will be no order as to costs in this court or either of the lower courts.

Craig and Colenbrander, Members, concurred.

Appellant in person

Respondent in person.

NORTH-EASTERN BANTU APPEAL COURT.

MBATA vs. ZONDO.

B.A.C. CASE No. 59 OF 1964.

ESHOWE: 12th January, 1965. Before Cowan, President; Craig and Scheepers, Members.

MESSENGER OF COURT.

EVIDENCE.

Attachments by Court Messenger—physical taking of possession—vindicatory action—proof of ownership.

Summary: Plaintiff brought a vindicatory action for the delivery of a allegedly wrongfully attached and handed to defendant and judgment was given in favour of the latter. A previous judgment, which was undisturbed, of the Court had awarded this beast to the defendant. In view of this earlier judgment was not the owner of the beast. The Messenger of Court had not taken physical possession of the beast though a note on the writ concerned indicated that it had been executed and satisfied.

Held: That the attachment purporting to have been made by the Messenger was null and void.

Held: That as plaintiff was not the owner of the beast he could not succeed in the action.

Cases referred to:

R. versus Coetzee, 1923, T.P.D. 89.

Works referred to:

Jones and Buckle, 6th Edition, page 264.

Legislation referred to:

Bantu Affairs Commissioner' Courts, Rule 67 (3) and (4).

Appeal from the Court of the Bantu Affairs Commissioner, Mahlabatini.

Cowan. President:

The appellant, who was the plaintiff in the Court below, claimed from the respondent (defendant) the delivery of a certain cow and in his particulars of claim he alleged that he was the owner of the beast and that the respondent was in wrongful possession of it. It was common cause that the beast had formed the subject matter in a previous action between the same parties and that the judgment of the Court was one awarding the beast to the present respondent. It transpires further from the evidence led that a warrant for the attachment of the animal was subsequently issued. The Messenger of the Court stated in in evidence that he had served this warrant on the appellant personally but that as the animal was missing at the time he informed the parties that if it was found later it would have to go to the appellant. He inventoried the animal as having been attached and added the following note, "Head boy Mbaca Mbata reports that the above animal has been missing for some time." He subsequently made a note on the writ to the effect that it had been duly executed and satisfied. Although the respondent stated that the animal had been delivered to him by the Messenger it would seem that that was not in fact the case as this officer says that he made the note because the respondent told him that he had now found the beast and he was then satisfied that the writ had been duly executed.

The Commissioner found that the Messenger had complied with the requirements of sub-rule 67 (3) of the rules of Bantu Affairs Commissioners' Courts, which require him to exhibit the original warrant of execution and deliver to the debtor or leave on the premises a copy thereof, and ruled that in terms of sub-rule 67 (4) the stock inventoried by him was deemed to be judicially attached and that a valid and legal attachment did take place. He accordingly entered judgment for the respondent with costs.

The circumstances attending the purported attachment in this case are very similar to those in the case of *R. versus Coetzee,* 1923 T.P.D. 89 (cited in Jones and Buckle, sixth edition, at page 264.) In this case, as in that one, there was no physical taking of possession by the Messenger and as this essential element of seizure was absent the alleged attachment was invalid and void.

This, however, does not end the matter. The action brought by the appellant was clearly a vindicatory one as he claimed to the owner of the animal and neither alleged nor proved that he had been despoiled of it by the respondent. In view of the judgment given in the previous action it is clear, as was conceded by Mr. Wynne who appeared for him in this Court, that he was not the owner and as ownership is an essential prerequisite in vindicatory action he could not succeed in his action.

The appeal is accordingly dismissed with costs.

Craig and Scheepers, Members, concurred.

For Appellant: Mr. B. Wynne instructed by F. Tromp.

Respondent in person.

NORTH-EASTERN BANTU APPEAL COURT.

KHESWA vs. HADEBE.

B.A.C. CASE No. 72 OF 1964.

ESHOWE: 13th January, 1965. Before Cowan, President; Craig and Colenbrander, Members.

NATAL CODE OF BANTU LAW.

Adultery—damages—woman and her husband not living together as man and wife.

Summary: Plaintiff sued for and was awarded damages in a Chief's court in respect of defendant's adultery with his wife. This award was confirmed on appeal to the Bantu Affairs Commissioner's Court.

Held: That no action for damages lay as plaintiff and his wife were not living together as man and wife at the time of the adultery.

Legislation referred to: Natal Code of Bantu Law section 138.

Appeal from the Court of the Bantu Affairs Commissioner, Nqutu.

Cowan, President:

This case originated in a Chief's court where the plaintiff, the present respondent, sued the defendant, appellant, for "6 head of cattle damages for pregnancy of plaintiff's wife." The defendant's reply to the claim is recorded as being, "Admits liability but avers that he did not know that plaintiff's wife was a married woman." The Chief entered judgment for the plaintiff for 5 head of cattle or R50 damages with costs of R4.30 and furnished the following reasons for judgment: "It was proved beyond doubt that plaintiff was legally married to the woman at the time of the adultery."

At the hearing of the appeal which was made to the Bantu Affairs Commissioner, the following statement of defence was recorded:—

1. I did not go to plaintiff's kraal. I just met this woman Matigulu Molefe.
2. When the case was heard by the Chief the woman said that she was divorced.
3. I admit responsibility for the pregnancy but I did not know she was plaintiff's wife.

The Commissioner upheld the Chief's judgment with costs and says in his reasons for judgment that as the defendant did not give evidence and could, therefore, not be subjected to cross-examination he did not accept his plea that he did not know that Matigulu was the plaintiff's wife.

It is clear from their reasons for judgment that neither the Chief nor the Bantu Affairs Commissioner has had regard to the proviso to Section 138 of the Natal Code of Native Law which lays down that no action for damages for adultery shall lie in the case of connivance on the part of the husband or if at the time of the adultery the woman and her husband were not living together as man and wife.

In the case before us, the evidence of the woman was, briefly, to the effect that she had returned to her father's kraal because of a quarrel between herself and the plaintiff and that she had already been there for five years before she "fell in love" with the defendant and that in view of this long period she no longer regarded herself as the plaintiff's wife. Under cross-examination by the defendant, she admitted that she had told him that she

had stayed at her father's kraal for eight years and that she had not told the defendant that she was the plaintiff's wife until after her pregnancy for the reason that they were staying apart. It is true that the plaintiff maintained that she had merely visited her father's kraal but he was obliged to admit under cross-examination that while she was there she had already had a child by another man and that the question of the birth of this child was still under discussion.

The woman was the plaintiff's own witness and I can see no reason why her evidence should not be accepted. Her stay at her father's kraal for a period of at least five years cannot be regarded as merely a visit and her statement, which he made no attempt to refute, that she no longer regarded herself as the plaintiff's wife, suggests that he had taken no steps to effect a reconciliation between them and that he in fact acquiesced in her living apart from him. That this was so is also borne out by the fact that she had had a previous illegimate child by another man and his failure to take timely and positive action in respect of this lapse of hers. For these reasons the plaintiff cannot be said to have been living with her as man and wife at the time the adultery was committed and the Commissioner should, therefore, have held that no action for damages lay.

In the result the appeal is allowed with costs and the judgment of the Bantu Affairs Commissioner is altered to read, "The appeal is allowed with costs and the judgment of the Chief's court is altered to one of, 'For defendant with costs'."

Craig and Colenbrander, Members, concurred.

For Appellant: Mr. W. E. White instructed by A. C. Bestall & Uys.

Respondent in default.

NORTH-EASTERN BANTU APPEAL COURT.

MANYONI vs. NKWANYANA AND THREE OTHERS.

B.A.C. CASE No. 83 OF 1964.

ESHOWE: 14th January, 1965. Before Cowan, President; Craig and Colenbrander, Members.

PLEADINGS AND PROCEDURE.

Defective summons—defective plea—liability of guardian for torts of wards—no indication by defendant that he applied for absolution or closed his case—assistance by Court to parties not legally represented.

Summary: Plaintiff sued the four defendants for the refund (sic) of wire or its value allegedly destroyed by the last three defendants. First defendant was sued in his capacity as guardian of the other three. He further claimed kaffir corn and mealies allegdly destroyed by the defendants. At the end of plaintiff's case a judgment dismissing the summons with costs was entered. Defendants did not testify.

Held: That the summons was bad as it did not disclose what right the plaintiff had in the articles in question.

Held: That the fact that the first defendant was the guardian of the other three did not necessarily make him liable for their torts.

Held: That if it was intended to attach lability to the first defendant as the head of the kraal of which the others were inmates that should have been stated.

Held: That a plea, a verbal one made in Court, was a bad one as it amounted merely to a denial of liability.

Held: That an indication should have been obtained from defendants as to whether they applied for an absolution judgment at the close of plaintiff's case or whether they closed their case.

Held: That the Commissioner should have assisted the plaintiff who was unrepresented to state his case clearly and fully.

Cases referred to:

Ngoma versus Kumalo 1941 N.A.C. (N. & T.) 35.

Appeal from the Court of the Bantu Affairs Commissioner, Hlabisa.

Cowan, President:

The plaintiff in this action sued the four defendants for "the refund of two rolls of wire or their value R12.80 the said wire having been destroyed by the second, third and fourth defendants wrongfully and unlawfully". The first defendant is said to have been cited as "party to the claim" in his capacity as guardian of the others. A further claim was for three bags of kaffir corn and four bags of mealies (or their value R36) which he alleged were destroyed by the defendants. The summons is a bad one as it does not disclose what right the plaintiff had in the articles in question nor does the fact that the first defendant was the guardian of the other three necessarily make him liable for their torts. If, as would seem to have been the case, it was intended to attach liability to him as the head of the kraal of which the other minor defendants were inmates, this should have been so stated.

The plea, which was made verbally in court, was also a bad one as it amounted merely to a denial of liability.

After the plaintiff and his witnesses had given their evidence the record concludes with a note, "Close of Plaintiff's Case", there being nothing to indicate whether the defendants had applied for an absolution judgment at that stage or whether they had closed their case.

On the first claim the Commissioner found that one strand of wire over a distance of 35 paces of a fence belonging to the plaintiff was damaged in parts by "the defendant's three herd-boys" (presumably defendants numbers two, three and four) but that the evidence before it did not enable the court to assess the damage. On the second claim also he found that there was no evidence as to what damage to the plaintiff's crops may have been caused by the defendant's cattle. He consequently dismissed the summons with costs.

On the record as it stands this court is unable to say that the Commissioner erred in holding that the plaintiff had failed to established what patrimonial damages, if any, had been suffered by him and the appeal must be dismissed with costs.

This court is constrained however to invite the attention of the Commissioner to the case of *Ngoma versus Kumalo* 1941 N.A.C. (N. & T.) 35 in which it was lain down that if a party is not legally represented by an attorney (as was the case here) the court should help him, by means of relevant questions, to state his case fully and clearly.

Craig and Colenbrander, Members, concurred.

Appellant in person.

Respondent in person.

NORTH-EASTERN BANTU APPEAL COURT.

MANANA vs. MANANA.

B.A.C. CASE No. 30 OF 1964.

DURBAN: 25th January, 1965. Before Cowan, President; Craig and van der Westhuizen, Members.

EJECTMENT.

DURBAN MUNICIPAL LOCATION REGULATIONS.

Ejectment—municipal housing—citing of municipal officer—lawful tenant.

Summary: The parties were married and a house was allocated to them. They were subsequently divorced and plaintiff sought the ejectment of defendant who refused to leave. The order for her ejectment was granted.

Held: That any right either party had to occupy the premises flowed from the regulations and as no discretion vested in the Location Superintendent it was unnecessary to cite him as a party.

Held: That as the residential permit in respect of the house concerned was issued to plaintiff he was, on dissolution of his marriage to Defendant, entitled to require her to vacate.

Legislation referred to:

Natal Provincial Notice No. 383 of 1960—Regulations Nos. 3 (2) and 7 (*i*) (vi).

Act No. 38 of 1927, section *twenty-two* (6).

Appeal from the Court of the Bantu Affairs Commissioner, Durban.

Cowan, President:

The respondent was the plaintiff in the lower Court and his summons against the defendant (now appellant) was issued on the 29th July, 1961.

The particulars of his claim were as follows:—

"1. The parties hereto are Natives as defined by Act No. 38 of 1927.

2. The plaintiff is the registered lawful tenant of the premises situated at No. 34, Road 15, Chesterville Location, Durban.

3. The defendant is in unlawful occupation of the said premises.

Wherefore plaintiff prays for—

(*a*) an order of ejectment from the said premises against the defendant;

(*b*) costs of suit;

(*c*) alternative relief."

The defendant, who was the divorced wife of the plaintiff, filed the following plea:—

"Save and except as hereinafter specially admitted the defendant denies each and every, all or any the allegations in plaintiff's summons herein contained and puts plaintiff to the proof thereof.

1. Defendant admits paragraph 1 of the summons.

2. Defendant denies that plaintiff is the registered lawful tenant as alleged.

3. Defendant denies that she is in unlawful occupation of the premises in question and states that she is the lawful tenant, by virtue of the divorce which was granted by the Native Divorce Court with an order for forfeiture of the benefits arising from the marriage against the plaintiff.

Wherefore defendant prays that plaintiff's summons be dismissed with costs."

The following further particulars to this plea were then requested by the plaintiff:—

"1. *Ad paragraph* 2:—Who does defendant say is the registered lawful tenant?

2. *Ad paragraph* 3.

(*a*) Would defendant set out in full details the facts on which she bases her defence that she is the lawful tenant by virtue of the order of divorce?

(*b*) Will defendant please explain the relevance of the divorce to the facts at issue in the present case?"

The defendant's reply to this request was:—

"1. Defendant.

2. (*a*) One of the benefits of the marriage was the tenancy and the divorce was granted with an order of forfeiture of benefits.

(*b*) Vide (*a*)."

The hearing of the action was then set down for the 23rd February, 1962, but, at the request of the attorneys of the parties, there were no less than five postponements and it finally went to trial only on the 20th January, 1964. This, as the Bantu Affairs Commissioner remarked, does indeed disclose a sorry state of affairs.

Before evidence was led the Court allowed an application to amplify the plea by the addition of the following two paragraphs:—

"Paragraph 4. As the Superintendent of the Chesterville Location is directly interested in the allocation of the site permit, he should have been cited in the summons.

Paragraph 5. The above Honourable Court has no Jurisdiction herein."

The evidence discloses that the parties were married in 1943 and divorced on the 4th April, 1961, when an order of forfeiture of the benefits of the marriage was made in favour of the present appellant. Here it may be remarked that it does not appear whether the marriage was one in community of property and of profit and loss or whether the legal consequence of marriage in community of property between the spouses was excluded by virtue of Section 22 (6) of Act No. 38 of 1927. It would seem that some years before their divorce they took occupation of certain premises, the property of the Durban Corporation, situated at 34 Nkomo Road, Chesterville Location, Durban. At that time no residential permits were issued to tenants but subsequently a survey was made and a copy of the relevant information obtained was sent to the respective occupiers under cover of a letter in which they were asked to report personally if such information was not correct and have the matter set right. There is nothing on record as to the date on which this survey was made nor as to whether the correctness of the information obtained by it was questioned by either of the parties. As a result of this survey, presumably, a residential permit in respect of this property was issued in terms of Natal Provincial Notice No. 383 of 1960 in

the name of the Plaintiff on the 21st July, 1961, and the name of the Defendant is included among others who, in terms of an endorsement on the permit, are stated to be, ". . . the only persons, subject to the aforesaid regulations, who are entitled to reside with you and occupy this accommodation."

The plaintiff says that after the divorce he asked the Defendant to vacate the house and that she refused to do so. He says that he then went and reported the matter to the location superintendent and that this was after he had issued the summons in July, 1961. His witness, Mr. Roche (the then superintendent) says that after the divorce he cancelled the plainiff's certificate of occupation with effect from 30th Sepember, 1961. He does not specifically say so but one gathers that he did so by virtue of the authority conferred on him by Regulation 7 (1) (vi) and for the reason that the Plaintiff, being so longer married, did not possess the necessary qualification entitling him to continue to occupy the house. His cancellation of the plaintiff's right to occupy the premises is of no moment, however, as this decision was subsequently set aside by the Director on appeal. He went on to say that the Direcor had agreed to a request by him that the defendant be allocated suitable accommodation of the same type and rental and that on the 5th January, 1962, he was in a position to offer her such accommodation but that she had refused this offer.

The evidence given by the defendant was mainly irrelevant and took the matter no further. In cross-examination she made it clear that she claimed the right to occupy the house because she had been awarded forfeiture of the benefits in the divorce action and she went on to say that she based her entire case on that order.

The Commissioner entered judgment for the plaintiff for an order of ejectment and costs and the defendant has now appealed against that judgment on the following grounds:—

„ 1. The learned Native Commissioner erred in holding that the jurisdiction of the Court was not ousted. It is submitted most respectfully that the Location Superintendent, has a direct and substantial interest in any Order affecting the rights of any person in, and to the occupation of the residential site in question and that he should have been cited as a party to the proceedings and failure so to cite him constituted a fatal defect in plaintiff's summons.

2. The learned Native Commissioner erred in not taking into consideration that defendant and four others had lawful occupation of the residential site in question till 30th September, 1961. He further erred not to take into consideration the fact that the defendant and others had the right to occupy unless their names are deleted by the registered occupiers and this from the evidence of the Superintendent was 5th January, 1963. It is submitted in view of the above the Summons is premature.

3. The learned Native Commissioner erred in refusing an adjournment to enable defendant to call her witness.

The judgment is against the weight of evidence and the law arising therefrom."

The Commissioner held that the fact that an order of forfeiture of the benefits of the marriage had been made against the plaintiff did not itself entitle the defendant to occupy the premises and as this finding has not been appealed against it is unnecessary for this Court to give any ruling on this aspect of the case.

Although in the pleadings the parties have described themselves variously as "the registered lawful tenant" and the "lawful tenant" of the premises, it will be assumed for the purpose of this case that what each claimed to be was the person entitled to the occupation of the site in terms of the regulations contained in Natal Provincial Notice No. 383 of 1960.

It will be convenient to deal with the second and fourth grounds of the appeal first. The house is a municipal one and, although in her plea the defendant denied that the plaintiff was the "registered lawful tenant" of the premises, the evidence adduced clearly establishes that as the time of the issue of the summons he was the person to whom the site had been allocated in accordance with Regulation No. 3 (2).

I have difficulty in following the reasons of the Commisioner in that portion of this jugdment in which he deals with the right of the defendant to occupy the premises. On page 2 of his reasons, after referring to the terms of the residential permit issued on 21st July, 1961, he goes on to say, "amongst others, his ex-wife (the defendant), Agnes Manana was authorised to reside on the premises. Therefore, on the date of issue of summons defendant was still a legal occupier of the premises in terms of the permit hence also in terms of the location regulations. The Location Superintendent had, at that stage, not taken any action to regularise the position of the parties after the divorce. In my view it is immaterial what action was taken after *litis contestatio* because it cannot affect the issue of this case which was commenced on 29th July, 1961." On page 4 of his reasons, however, he expresses the opinion that the defendant was in the position of a trespasser but he does not say at what stage she ceased to be a legal occupier and became a trespasser. It becomes necessary for this Court, therefore to endeavour to ascertain what were her rights, if any, to occupy the premises. There is not a tittle of evidence to support her claim to be the "lawful tenant" of the property but as she also denied in her plea that she was in unlawful occupation it becomes necessary to deal with this aspect of the case.

Regulation 3 (2) makes provision for the allocation of suitable accommodation in a location to an applicant who qualifies for it and for the issue to him of a residential permit. The regulation then goes on to provide that: "Every such permit shall entitle the holder and his family and other persons, other than lodgers, entitled to reside with the holder, subject to the payment of the rental and other prescribed charges and to compliance with these Regulations, to occupy the accommodation therein specified." As the residential permit was issued to the plaintiff and not to the defendant and she ceased to be a member of his family after their divorce and was no longer entitled to live with him, whatever right she may have had to occupy the accommodation under the regulations in either of these capacities fell away and he was entitled to request her to leave and, on her failure to do so, to sue for her eviction.

Mr. Noren, who appeared for the appellant in this Court, intimated that he did not propose to pursue the first ground of the appeal and in my view he was correct in not doing so as whatever right the appellant had to occupy the accommodation could flow only from the regulations themselves and was not dependent on a discretion vested in the Superintendent by these regulations. It was unnecessary, therefore, to join him in the action as he had no direct or substantial interest in any order which the Court might have made in the matter.

He did not address the Court on the third ground of appeal either and, on the record. I can find no reason to hold that the Commissioner erred in refusing a further postponement of the matter.

It follows that the appeal must fail on all the grounds and it falls to be dismissed with costs.

Craig and Van der Westhuizen, Members, concurred.

For Appellant: Adv. D. Noren instructed by R. P. Singh.

For Respondent: Mr. H. E. Mall (R. I. Arenstein & Fehler).

NORTH-EASTERN BANTU APPEAL COURT.

GUMEDE vs. MBAMBO.

B.A.C. CASE No. 13 OF 1964.

DURBAN: 25th January, 1965. Before Cowan, President; Craig and van der Westhuizen, Members.

DAMAGES.

MAINTENANCE.

Damages for seduction—quantum—maintenance for children.

Summary: Plaintiff sued defendant for damages for seduction and was awarded R500 and for maintenance for the twins born as a result of her association with plaintiff and was awarded R10 per month. Defendant appealed against the quantum of these awards.

Held: That the award of R500 was excessive and should be reduced to R200.

Held: That the award of R10 per month for two children was reasonable and should not be varied.

Cases referred to:

Scholtemeyer versus Potgieter, 1916 T.P.D. 188.

Ngwane versus Vakalisa, 1960 N.A.C. 30.

Appeal from the Court of the Bantu Affairs Commissioner, Durban.

Cowan, President:

In this case the Bantu Affairs Commissioner entered judgment for the plaintiff for, *inter alia,* R500 damages for seduction and ordered the defendant to pay maintenance in the sum of R10 per month in respect of the two children (twins) which had been born to her. This appeal is only against the quantum of these awards.

The Commissioner has furnished the following reasons in support of his award of damages for the seduction:—

> "Plaintiff's father was a teacher and her mother is a midwife. Of her two sisters one has a B.A. degree and a Teacher's Diploma and married to a doctor. The other is a doctor, married to a doctor. Plaintiff and defendant were first year university students. The parties to this action are of high social standing. Another factor to be taken into account is the degree of resistance shown by plaintiff—See *Scholtemeyer versus Potgieter* 1916 (T.P.D. 188) where the Judge is reported to have said: 'Damages is not intended to punish defendant, they are to compensate plaintiff, but cases show that the degree of resistance shown by her is factor which is taken into account.'
>
> Defendant has been proved to have been working towards his aim from July, 1961, up to June, 1962, when he finally obtained his wishes under the promise of marriage'."

If, by the words "working towards his aim" in the second paragraph of the passages cited above, the Commissioner intended to convey that the defendant had worked towards plaintiff's seduction for the period mentioned, this Court is unable to agree with his finding. While it is true that her evidence discloses that they were on very friendly terms during this period—she, in fact, says that right at the beginning of their relationship

he asked her to become his wife after they had finished their studies—there is nothing in her evidence to indicate the period over which he attempted to seduce her before she capitulated, the degree of temptation she was subjected to, nor the resistance offered by her.

This case is in many respects similar to the case of *Ngwane versus Vakalisa*, 1960, N.A.C. 30 where an amount of R200 was awarded and in our view the same amount should be awarded here.

As regards the order of maintenance, this Court is quite unable to say that an award of R10 per month for the support of two children is unreasonable and, in the absence of any evidence by the defendant as to his means, we see no reason to reduce it.

The appeal is allowed in part with costs and the Bantu Affairs Commissioner's award of R500 damages for seduction is reduced to one of R200.

The costs of this appeal are not to include the costs for appearances on the 19th May, 1964, and the 29th September, 1964, which are to be paid by the appellant.

Craig and van der Westhuizen, Members, concurred.

For Appellant: Adv. W. H. Booysen instructed by Alec M. Edelson and Gideon Lotz.

For Respondent: Mr. L. B. Leisegang (C. G. Leisegang).

NORTH-EASTERN BANTU APPEAL COURT.

NONZALA vs. SOMHLAHLO.

B.A.C. CASE No. 62 OF 1964.

DURBAN: 25th January, 1965. Before Cowan, President; Craig and van der Westhuizen, Members.

CONTRACT.

CAPE MOTOR ORDINANCE.

Contract—sale and purchase of motor vehicle—transfer—Motor Ordinance 19/55 *(CAPE)—rescission—notice of intention to seek.*

Summary: Plaintiff and defendant agreed on the sale and purchase of a motor vehicle. The provisions of the agreement were allegedly not complied with by defendant and the former sued him for the full balance of price due and was given judgment for what he asked for. Defendant, in turn, alleged that plaintiff had not complied with the provisions of the agreement and counterclaimed for rescission of the contract and the refund of certain moneys. The Court gave no judgment on the counterclaim.

Held: That it was incumbent on the plaintiff to give transfer to the defendant in terms of the agreement and to make all necessary arrangements to do so.

Held: That time was not the essence of the contract and that it was incumbent on defendant to give plaintiff notice to comply before seeking rescission.

Cases referred to:

Microutsicos and Ano. vs. Swart 1949 (3) S.A. 715 (A.D.).

Legislation referred to:

Motor Ordinance 19/55 (CAPE) Sections 4 (4), 17 (1) and (3).

Appeal from the Court of the Bantu Affairs Commissioner, Durban.

Cowan, President:—

On the 6th February, 1962, the Plaintiff and the Defendant entered into a written agreement the terms of which were as follows:—

"1. The seller herein is the owner of a 1958 CHEVROLET 1¼ ton truck which he agrees to sell to the purchaser.

2. The purchase price agreed upon in respect of the said truck is a sum of £625 (R1250.00).

3. The seller hereby acknowledges to have already received a sum of £225 (R450.00), from the purchaser as part payment of the purchase price agreed upon.

4. The purchaser further agrees to pay a further sum of £200.00 (R400.00) to the seller on the 23rd February, 1962 at No. 1 Store, Jacobs Location, DURBAN.

5. The seller and the purchaser further agree that the balance £200 (R400.00) shall be paid in monthly installments of R30.00 per month until the said sum of R400.00 shall have been paid off.

6. The seller and the purchaser agree that the said truck is sold as it stands without any warranties express or implied.

7. If the purchaser fails to make (any) payment within seven (7) days after date the seller shall be entitled to sue for the remaining balance.

8. Any leniency accorded to the purchaser by the seller in respect of paragraph seven (7) hereof, shall not be taken as a waiver of the seller's rights thereof.

9. The seller will give the purchaser transfer of the said truck on the 19th February, 1962.

10. The purchaser is responsible for the costs of agreement."

In his summons issued on the 17th May, 1962, the plaintiff (now appellant) alleged that the defendant (respondent) in breach of paragraphs 4 and 5 of the agreement, had failed to pay on due date. He maintained that in terms of paragraph 7 of the contract he was entitled to recover from the defendant the sum of R800, being the balance of the purchase price, and prayed for judgement against him in this amount with costs.

The only defence of any substance pleaded by the defendant—and the only one relied on in the Court below in this court—read as follows:—

"2. Ad para 6 of plaintiff's summons defendant admits that he failed to pay as alleged, but defendant says that he is excused from making payment by virtue of the fact that plaintiff was first in breach of the contract in that he failed to give defendant transfer of the vehicle on due date as provided by para 9 of the written agreement and has to date failed to effect such transfer."

He, in his turn, counterclaimed against the Plaintiff for—

(*a*) rescission of the contract;

(*b*) refund of the sum of R450 paid by him to the plaintiff against delivery of the truck by him to the plaintiff;

(*c*) refund of R20.82 paid by him for "necessary repairs on the truck";

(*d*) costs;

(*e*) alternative relief.

It is unnecessary for the purpose of this judgment to set out his main cause of action as this also had no substance and was not relied on. His alternative cause of action was, "Plaintiff in breach of paragraph 9 of the said agreement failed to give defendant transfer of the said truck on due date and has to date failed despite demand to do so." In his plea to the counterclaim, the plaintiff's reply to this allegation was,

> ". . . Plaintiff denies this paragraph and puts defendant to the proof thereof. Plaintiff avers that defendant fails to turn up at the time and place agreed upon to accept the said transfer."

The Commissioner found that the defendant had "failed on purpose" to attend at Tsolo from the 19th to the 21st February, 1962, and held that "the doctrine of fictional fulfilment" applied. He entered judgment on the claim in convention for the plaintiff for R800 and costs, but omitted to give any judgment on the counterclaim, and this judgment has been brought an appeal before this court.

In finding, as it would seem from his reasons for judgment that he did, that the defendant prevented the plaintiff from effecting transfer of the vehicle into the defendant's name, the Bantu Affairs Commissioner has in my view read more into the record than appears in the evidence. It was a condition of the sale that the plaintiff would give him transfer of the truck on the 19th February, 1962, and the plaintiff's evidence in regard to this aspect of the case reads as follows:—

> "Transfer was supposed to be effected on 19/2/62. Transfer was not effected. It was to be effected at Tsolo. I went to Tsolo on 18/2/62, the day prior to day of transfer agreed upon. Arrived on 19th Feb. The defendant was not there. I stayed at Tsolo three days i.e. Monday, Tuesday and Wednesday. We went away on Wednesday afternoon, the Defendant no having turned up. . . After his failure on the 19th the defendant did not make any further attempts to obtain transfer . . . As far as para. 9 of contract is concerned, I had in mind to effect transfer on 19/2/62 because registration of truck was at Tsolo and because his children wanted to see truck. I picked 19/2 because I knew I would have a free Saturday to travel.
>
> Did not know car had to have certificate of fitness before it could be transferred. I did have a car previously. I do not agree that it was orally agreed that the seller would take steps to have the car tested so that transfer could be effected on 19th. . .
>
> It did not occur to me to take steps to have car transferred into his name because he did not fulfil any condition of agreement. . .
>
> I am still prepared to transfer vehicle provided he pays money due . . ."

The defendant's evidence on this point reads as follows:—

> "he (the plaintiff) said the certificate of fitness would be obtained at Lusikisiki. He told me he would obtain same certificate after car had been tested prior to our proceeding to Tsolo. . . We discussed question of licence fees that plaintiff would pay licence fees himself at Tsolo. He said licence fees had been paid for other year but when it is transferred to other district he would pay other licence fees. . . I had agreed with plaintiff he would come to Lusikisiki that vehicle could be tested for certificate of fitness. Plaintiff said the testing of the vehicle would be done at Lusikisiki. . . When it was said in agreement that I should get transfer on 19th, it was verbal arrangement. I don't know cause. But it meant car would be tested by the 19th. On 19th I took steps to get to Tsolo. Did not get there.

> The car would not move. I used oxen to pull it and it was pushed into the garage. It was then repaired and I returned home with it during the night. I meant returning to Tsolo the following day. I assumed I might find him there. On the following day I had no money because I had used the money to repair the motor car . . ."

In his reasons for judgment the Commissioner says that the plaintiff's story about the certificate of fitness is very doubtful but then goes on to say, " But be that as it may, he would have been forced to face that issue (presumably, the obtaining of the certificate) in the process of transfer had the defendant kept to the agreement and attended at Tsolo on the agreed date." Although he does not specifically say so, it would appear from his reasons that he did not believe the defendant's statement that the plaintiff had undertaken to have the truck tested at Lusikisiki before the 19th February.

In terms of clause 9 of the contract it was incumbent on the plaintiff to give transfer of the truck to the defendant and it was for him to make all the necessary arrangements to do so as there is nothing in the contract which required the defendant to assist him in this nor was there any verbal agreement obliging the defendant to do so. It was common cause that the vehicle was not licensed for the year 1962 and in terms of the Road Ordinance its transfer into the name of the defendant therefore involved, as far as the plaintiff was concerned—

(*a*) the obtaining of a current licence for that year [(section 17 (1)];

(*b*) the completion of a form transferring the vehicle into the defendant's name [(section 17 (3)] and;

(*c*) the production of a certificate of roadworthiness [section 4 (4)].

I can see no reason, and the plaintiff has advanced none, why, notwithstanding the defendant's absence, he took no steps to comply with requirements Nos. (*a*) and (*b*) above as the failure of the defendant to keep his appointment on that day in no way prevented him from doing so. As regards (*c*), the absence of the vehicle did preclude him from obtaining the required certificate on that day but the question arises whether he could fairly lay the blame for this at the defendant's door. Whatever the position may have been had it been shown that it had been arranged that the defendant should produce the vehicle at Tsolo on the day in question for the purpose of having it examined, and that he deliberately and in bad faith made default in doing so, there is nothing in the evidence which suggests that any such arrangement was made. The Commissioner would seem to have assumed that the plaintiff was entitled to expect that the defendant would produce the car there on that day but the evidence does not warrant the drawing of such an assumption which is, in any case, completely negatived by the plaintiff's own statement that he " did not know car had to have certificate of fitness before it could be transferred."

As it was not established that the defendant's absence at Tsolo prevented the plaintiff in any way from taking such steps as he was obliged to do to effect the transfer of the vehicle, the doctrine of fictional fulfilment was not applicable. It follows that as the plaintiff had himself failed to carry out his obligation under the contract he was not entitled to sue for the balance of the purchase of the vehicle.

To deal with the counterclaim. In this court the appellant's council conceded, rightly in our opinion, that the appellant had not established his case. Although the giving of transfer of the vehicle had been stipulated for the 19th February and the plaintiff was *in mora,* time was not the essence of this contract and the defendant could only make it so by giving the plaintiff notice that if he did not comply with clause 9 by a certain date, allowing a reasonable time, he would regard the contract as at

an end (*Microutsicos and Ano. versus Swart,* 1949 (3) S.A. 715 (A.D.). There is no evidence whatever to support the allegation in his counterclaim that transfer of the truck had been demanded from the plaintiff and he was, therefore, not entitled to a judgment rescinding the contract.

For these reasons the appeal will be allowed with costs and the judgment of the Bantu Affairs Commissioner altered to one of, "Absolution from the instance with costs on both the claim in convention and the counterclaim."

Craig and *van der Westhuizen,* Members, concurred.

For Appellant: Adv. R. Chandrin instructed by R.I. Arenstein & Fehler.

For Respondent: Adv. M. D. Naidoo instructed by Don Kali & Co.

NORTH-EASTERN BANTU APPEAL COURT.

KUZWAYO vs. TSILO.

B.A.C. CASE No. 82 OF 1964.

DURBAN: 26th January, 1965. Before Cowan, President; Graig and van der Westhuizen, Members.

PRACTICE AND PROCEDURE.

Postponement of case by agreement between parties—no presumption that Court will agree thereto—lapsing of appeal.

Summary: There was no appearance for appellant. Counsel for respondent informed the Court from the bar that he and the appellant's counsel had agreed that the matter be postponed and formally applied for postponement.

Held: That parties not entitled to assume that Court would automatically agree to a postponement.

Held: That appeal be deemed to have lapsed and struck off the roll.

Cases referred to:

Dladla versus Kumalo, 1947 N.A.C., 141 (N. & T.).

Legislation referred to:

G.N. No. 2887 of 1951—Rule 15.

Appeal from the Court of the Bantu Affairs Commissioner, Pinetown.

Cowan, President:

There was no appearance by the appellant in this appeal and counsel for respondent advised us from the bar that because of certain misunderstandings it had been agreed between him and the appellant's attorneys that the hearing of the appeal should be postponed by consent to the next session of this court.

The parties were not entitled to assume that the court would automatically agree to the postponement of the hearing of the appeal merely because they had agreed to such a postponement —see Rule 15 of the rules of this court contained in G.N. 2887 of 9th November, 1951—and following the decision in the case of *Dladla versus Kumalo* 1947, N.A.C., 141 (N. & T.) the appeal is deemed to have lapsed and it is struck off the roll.

Graig and van der Westhuizen, Members, concurred.

Appellant in default.

For Respondent: Mr. R. I. Darby (McClung, Le Marchand, Goudge & Co.).

NORTH-EASTERN BANTU APPEAL COURT.

MAKABANE vs. MALUKA.

B.A.C. CASE No. 3 OF 1965.

PRETORIA: 1st March 1965. Before Cowan, President; Craig and Chatterton, Members.

BANTU CUSTOM.
DAMAGES.

Adultery—damages—quantum—alternative value of cattle.

Summary: Plaintiff was awarded damages of five head of cattle or their value R100 against defendant who committed adultery with the former's wife.

Held: That there was nothing on record to show that the award of five head of cattle was in accord with the usual damages recognised by the system of Native law applicable in this case.

Held: That the alternative value awarded had not been established by evidence.

Appeal from the Court of the Bantu Affairs Commissioner, Bushbuckridge.

Legislation referred to: Act No. 38/1927, Section 11 (2), Bantu Affairs Commissioner's Court Rule No. 14.

Cowan, President:—

The respondent sued the appellant in the Bantu Affairs Commissioner's Court and the particulars of his claim were as follows:—

"(1) The parties hereto are Natives as defined by Act 38 of 1927.

(2) Plaintiff is married according to native custom to Flora Malupi, which union still subsists.

(3) At divers times and places but more particularly September, 1963, and at Pola, defendant wrongfully, and unlawfully committed adultery with plaintiff's wife.

(4) As a result plaintiff has suffered damages in the extent of five head of cattle or their value R100."

The appellant admitted paragraphs 1 and 2 in his plea but denied paragraphs 3 and 4 and put the respondent to their proof. Judgment was entered for the plaintiff as prayed and this judgment has now been appealed against on the following grounds:—

"(1) The judgment is against the evidence and the weight thereof;

(2) There is no evidence showing that plaintiff suffered damage as claimed or any damage at all, alternatively there is no proof that plaintiff suffered the quantum of damage claimed."

In this Court the appellant's counsel sought to introduce a new ground of appeal i.e. that it was possible that the action had previously been decided in a Chief's Court and urged this Court to remit the matter to the Bantu Affairs Commissioner for investigation into this point as he contended that there might have been an irregularity prejudicial to the defendant if the case had been heard in the lower Court as being one of first instance instead of as an appeal from the Chief's Court. This Court is not disposed to accede, to this request. Firstly, because there is nothing in the record which points to the matter having previously been heard before a Chief's Court—although there is evidence of the matter having come before an Induna for arbitration—and, secondly, because the requisite Notice of the application has not been furnished in terms of Rule 14 of G.N. No. 2887 of 1951.

The Commissioner has omitted to find as a fact that adultery was committed but it is clear from his reasons for judgment that he did arrive at this conclusion. There was ample evidence to justify such a finding. This was conceded by appellant's counsel and the appeal in so far as it is based on ground one must fail.

The Commissioner's reasons for judgment in respect of the second ground of appeal read as follows:—

> " Eiser se eis is nie buitensporig nie en daarom het ek sy eis toegestaan, naamlik vyf beeste of hulle waarde R100. Die geldwaarde van die beeste word as redelik beskou.".

This information is of no assistance to this Court. In the first place, we are left in the dark as to whether the Commissioner has himself arbitrarily decided that the claim for five head of cattle was not exorbitant or whether it does, in fact, accord with the usual damages recognised by the system of Native law applicable to this particular case. In the second place, in the absence of any information in the record as to the tribe to which the parties belong or, in the event of their belonging to different tribes, of the other relevant information referred to in section *eleven* (2) of Act No. 38 of 1927, this Court is quite unable to determine what particular system of Native law governs the case.

For these reasons the appeal is allowed in part, the judgment will be set aside and the case remitted back to the Bantu Affairs Commissioner for the calling of such further evidence as will enable him to determine the system of Native law applicable to the case and for the making of a fresh award of damages in accordance with the scale recognised by such system. If such scale has not received recognition in a judgment of this Court it must be established by calling expert evidence.

Further, the alternative value placed on the cattle was not established by any evidence, the Commissioner was not entitled to take judicial notice of his own knowledge of the value of cattle in his area and the alternative value of R20 placed on the cattle by the plaintiff carries no weight as specific cattle were not sued for. Unless there is recognised standard alternative value of cattle paid as fines in the area, evidence must also be called to prove the value of average mixed type of cattle found in Bantu locations.

The question of costs in this Court will abide the findings in the Commissioner's Court as was agreed to by Counsel for both parties.

Craig and Chatterton, Members, concurred.

For Appellant: Mr. Z. de Beer instructed by Mare and Potgieter.

For Respondent: Adv. H. J. Eiselen instructed by P. J. Conradie.

NORTH-EASTERN BANTU APPEAL COURT.

ZUMA vs. NDHLOVU.

B.A.C. CASE No. 48 OF 1964.
PIETERMARITZBURG: 15th March, 1965. Before Cowan, President; Graig and Reibeling, Members.

COMMON LAW.

Purchase and sale—delivery—causa detentionis—increase of costs by agreement—considerations.

Summary: Plaintiff purchased a beast from one Mkize who had bought it from one Gumbi. The beast was left with Gumbi who disposed of it to defendant. Plaintiff sued defendant for return of the beast.

Held: That there had been due delivery of the beast concerned as between the various sellers and buyers and that plaintiff was entitled to recover it from defendant.

Cases referred to:

Xapa versus Ntsoko, 1919, E.D.L.

Appeal from the Court of the Bantu Affairs Commissioner, Estcourt.

Reibeling, Member:

There is no dispute about the facts of this case and these are briefly as follows:—

Batani Mkize bought a certain fawn heifer for R34 from Mlandu Gumbi who was living on a farm of a certain Mr. McFie and left it on the farm where Gumbi looked after it. He stated in cross-examination that he did not take delivery of it as he was refused permission to take it into the Bantu location in which, presumably, he resided. On being asked what arrangements were made as regards the herding of the beast after he had bought it he replied that no arrangements were made and that he did not pay anything to keep it there. Thereafter, he sold the animal to the plaintiff, the respondent in this appeal, for the same price and pointed it out to him at Gumbi's kraal but that Gumbi was not present as they could not find him. After the plaintiff had paid him the purchase price, which was on the day of the transaction, he went to Gumbi and told him that he had sold the beast and asked him to arrange for a permit when the plaintiff came. The plaintiff corroborated Mkize's story of the sale of the beast to him and said that Gumbi obtained a driving permit (presumably, the written authority of the owner of the farm to remove the beast) and that he then sent boys to fetch the beast but that they were unable to do so as it was wild. He himself went to the farm a few days later and saw both Gumbi and the beast and went to see Mr. McFie for the purpose of arranging to have the animal taken to his cattle kraal for the purpose of putting a rope on it and then asked Mr McFie to keep it for him. A month or two later he returned to the farm and found that Gumbi had left with the beast. He reported the matter to Mkize and they searched for and found Gumbi. The latter admitted that he had taken the beast but would not disclose what he had done with it—he had, in fact, paid it to the defendant as *lobolo* for the latter's sister. He asked to be allowed to pay for the animal but this request was refused by the plaintiff. The plaintiff then reported the matter to the Bantu Affairs Commissioner's office and was advised to look for the beast and find out whether Gumbi sold it or slaughtered it. Two or three years later Mkize discovered that the beast had been delivered to the defendant and the plaintiff then instituted the present proceedings.

The Bantu Affairs Commissioner found on the evidence that there had been a sale of the animal from Gumbi to Mkize and from Mkize to the plaintiff, and that delivery had taken place in both transactions and entered judgment in plaintiff's favour for it and its three increase, or their value R94, with costs and this judgment has been appealed against on the ground that the Commissioner had erred in finding that the plaintiff had become the owner of the beast because he had failed to prove on a balance of probabilities that there had been delivery of the beast from Gumbi to Mkize and/or from Mkize to the plaintiff.

In arriving at the conclusion at which he did, the Commissioner relied on the judgment in the case of *Xapa versus Ntsoko*, 1919, E.D.L. but in this Court Mr. Menge, who appeared for the appellant submitted that this case must be distinguished for Xapa's case because in the instant case the element of an agreement to effect symbolical delivery was missing in that there was no mention of such an egreement and no *causa detentionis*; that Mlandu continued to exercise some control over the beast and that, as there was no indication of any undertaking to exercise that control on behalf of Mkize, his control was consistent with an intention that delivery should only pass some time later.

There is no doubt that a sale between Gumbi and Mkize did in fact take place and that the purchase price was paid. In regard to the other features of that transaction the evidence is admittedly scanty, but certain facts emerge clearly enough from the parties' subsequent actions and subsequent events.

When Mkize bought the beast from Gumbi he could not remove it because he failed to obtain permission to take it into the location. This negatives the contention that there was no *causa detentionis*. When Mkize resold the beast to plaintiff, it was running on the farm of Mr. McFie and was being looked after by Gumbi. After Mkize was paid for the beast by plaintiff, he (Mkize) went to Gumbi and told him that he had sold the beast to plaintiff and asked him to arrange for a driving permit when the plaintiff came. Gumbi, pursuant to that request, obtained that permit and handed it to plaintiff. An inference can fairly be drawn from these facts that there was in fact an agreement whereby Gumbi was to retain and look after the beast on behalf of the purchaser. The events described are outward manifestations of an intention on the part of the contracting parties that is consistent with the existence of such an agreement. In arriving at this finding consideration was given to the fact that Mkize, on being asked what arrangements were made as regards the herding of the beast after he had bought it, replied that no arrangements were made and that he did not pay anything to keep it there. In the light of the evidence as a whole and the wording of the question put to Mkize I do not construe his reply as meaning that no arrangements were made at all, but rather that no specific arrangements were made with regard to herding and that no monetary arrangements were made.

When Mkize sold the beast to plaintiff he was able, in the absence of Gumbi, to point out the identical beast previously sold to him by Gumbi. From this it can reasonable be inferred that the beast was pointed out by Gumbi to Mkize when the sale between them took place.

In the case of *Xapa versus Ntsoko* referred to above, the learned Judge mentioned the three requisites necessary in a symbolical delivery. (The learned Judge used the term "symbolical delivery" but in the heading of the record of that case delivery *longa manu* is mentioned). The three requisites are: First, there must be the intention to resort to that form of delivery; secondly, there must be the pointing out the *in praesenti* and the placing at the disposal of the deliveree; and thirdly, there must be identification or clear ascertainment of the thing delivered. I am of the opinion that the evidence in the instant case discloses compliance with those requisites and that ownership in the beast concerned consequently passed to Mkize.

With regard to the sale of the beast by Mkize to plaintiff, it is quite clear that delivery took place. Plaintiff attempted to remove the beast from the farm. He failed because it was wild. He then arranged with Mr. McFie, the owner of the farm, to keep it for him.

It follows from the above that plaintiff became owner of the beast and that he can, therefore, rightly demand from defendant its return together with its progeny or payment of their value. The appeal is dismissed with costs.

After the Court had intimated that it would consider its judgment, Mr. Menge stated that it had been agreed between counsel that items 4 and 5 of Table B of the Annexure to this Court's rules should each be increased to R8.40. In our view, the nature of the case does not justify the increase of these items and, as no authority was cited in support of the suggestion that an increase of these items would be ordered merely because of an agreement between counsel this Court is not disposed to make that agreement an order of Court.

Cowan, President, and Graig, Member, concurred.

For Appellant: Adv. W. O. H. Menge instructed by Hellet & De Waal.

For Respondent: Mr. L. Nathan (J.B. Tod & Co.).

NORTH-EASTERN BANTU APPEAL COURT.

MBEJE vs. MKIZE.

B.A.C. CASE No. 45 OF 1964.

PIETERMARITZBURG: 15th March, 1965. Before Cowan, President; Craig and Reibeling, Members.

COMMON LAW.

Defamation — limited publication — provocation — quantam of damages.

Summary: Defendant appealed against a Bantu Affairs Commissioner's judgment awarding plaintiff R40 damages for defamation on a claim for R400. Defendant had alleged drunkenness on the part of plaintiff.

Held: That the defamation had been proved but that the damages awarded were excessive as publication was limited and in view of plaintiff's provocative and improper actions.

Cases referred to:

Tsepe versus Tjamela 1946 N.A.C. (N. & T.) 98.

Maisel versus Van Naeren 1960 (4) S.A. 836.

Appeal from the Court of the Bantu Affairs Commissioner, Bergville.

Cowan. President:

An application for the late noting of this appeal fell away as the Court was not satisfied on the information before it that the appeal had in fact been noted late.

Both parties in this case are prison warders and the plaintiff (the respondent in this appeal) claimed R400 damages for defamation alleging that the defendant (appellant) had spoken the

following words in Zulu concerning him: "Pumani nangu uMkize udakiwe". The meaning he attached to the words in his summons was, "Mkize (meaning the plaintiff) is drunk on duty" but it seems to have been accepted by the parties, and was so accepted by the Court below, that the correct meaning of the words is, "Come out and see Mkize. He is drunk." The summons was excipiable in that it did not give the names of the persons in whose presence the words were alleged to have been uttered [*Tsepe versus Tjamela* 1946 N.A.C. (N. & T.) 98] but it appears to be common cause that they were addressed by the defendant to the Member-in-Charge of the gaol in which the parties are employed.'

The judicial officer found the following facts to have been proved:—

"1. Defendant asked plaintiff for cell keys and plaintiff swore at him calling him by his mother's private parts.

2. The next day they again quarrelled over the keys and plaintiff again swore at defendant. He raised his knobstick and when defendant fled, chased after him for a few yards.

3. Defendant then fled to the Gaol Office where he uttered the words which are the subject of this action.

4. Plaintiff was not under the influence of liquor at the time.

5. Defendant was upset because he had been sworn at by being called his mother's private parts and that plaintiff had raised his knobkierie at him.

6. Defendant did not believe plaintiff was drunk and made the report that he was drunk to paint plaintiff's actions in the worst possible light.

7. The words used were *per se* defamatory under the circumstances under which they were uttered published."

He found in favour of the plaintiff and awarded him R40 damages with costs.

In this court, Mr. van Heerden, who appeared for the appellant submitted that even if it be held that the words complained of were defamatory the circumstances were such as to manifest an absence of *animus injuriandi* and that the respondent has failed to discharge the onus of establishing such *animus*. In support of this submission he cited the case of *Maisel versus van Naeren*, 1960 (4) S.A. 836 and referred to certain passages in the appellant's evidence in which he had stated, "I did not mean to slander the plaintiff. It was his own actions which prompted this . . . I did not go just to scandal". In his evidence he had also said that he could clearly see that there was something wrong with him (the plaintiff) and that he could not say whether it was liquor or not but his actions indicated that he had something to drink or that he was mentally deranged.

In the view of this court, the words uttered were clearly defamatory *per se* as the judicial officer found them to be. Nor has this court been persuaded that the appellant was justified in using the words he did. It is true, as was pointed out by Mr. van Heerden, that nowhere in his evidence did the respondent deny that he was under the influence of liquor but he may well have thought that it was unnecessary for him to do so as it was common cause that the appellant's contention that he was either drunk or mentally deranged was refuted by the doctor who had examined him and found him to be neither the one nor the other. Instead of making a factual report that the respondent had threatened to assault him, the appellant took it upon himself, without sufficient cause, to infer, and report, that the respondent was drunk. In doing so he acted at his peril as he should have had in mind the possibility that he might not be able to substantiate his charge of drunkenness. In my view the appeal on the merits must fail.

As regards the appeal in respect of the quantum of the damages awarded, I am of the opinion that in the circumstances of this case these were excessive as the Bantu Affairs Commissioner would seem not to have regard to the very limited publication of the slander. Here it must be borne in mind that the words were uttered to the Respondent's superior officer only and that the plaintiff must, in this officer's eyes, have been cleared of the charge made against him by the findings of the doctor who subsequently examined him. A further consideration is the fact that it was the highly provocative and improper actions of the respondent which led to the report being made in the first place. For these reasons I consider that an award of R5 would have been adequate.

In my view, the appeal should be allowed in part and the judgment of the Bantu Affairs Commissioner altered to one of, "For plaintiff for damages in the sum of R5 with costs." As the appellant has had a substantial success in the reduction of the damages and as the costs of the appeal were not appreciably increased by the appeal on the merits, he should also be awarded the costs of the appeal.

Craig and Reibeling, Members, concurred.

For Appellant: Adv. J. A. van Heerden instructed by A. P. van der Merwe.

For Respondent: Adv. J. Kriek instructed by Macaulay & Riddell.

NORTH-EASTERN BANTU APPEAL COURT.

MOTAUNG vs. ZULU.

B.A.C. CASE No. 78 OF 1963.

DURBAN: Judgment delivered at Pietermaritzburg on 17th March, 1965. Before Cowan, President; Craig and Van der Westhuizen, Members.

COMMON LAW.

Maintenance—illegitimate child—arrears—proof required.

Summary: Plaintiff sued for arrear maintenance from the date of her illegitimate child's birth on 1st October, 1960, and for an order for a monthly payment as from the date of issue of her summons.

Held: That as plaintiff had not proved what it had cost her to maintain the child she was entitled to no more than an order for monthly payments with effect from the date on which the order was granted.

Cases referred to:

Herfst versus Herfst 1964 (4) S.A. 127.

Appeal from the Court of the Bantu Affairs Commissioner, Durban.

The facts of the case are not material to this report.

Cowan, President:—

The judgment in the case of *Herfst versus Herfst* 1964 (4) S.A. 127 makes it clear that, in the absence of a prior maintenance order, the maxim of the common law that "a person does not live nor has to be maintained in arrear" bars the recovery of arrear maintenance as such but that this maxim does not operate against a parent who has incurred any liability or expenditure for the proper maintenance of the child from recovering the appropriate share thereof due by the other parent—the reason for the distinction being that the latter claim is not strictly one for arrear maintenance but for the indemnification of one joint debtor by the other joint debtor for the expenditure or indebtedness actually incurred at the time the need therefor actually arose.

As the Commissioner found in the instant case that the plaintiff failed to prove what expenditure or liability, if any, she had actually incurred for the maintenance of the child, he was correct in not entering judgment for her in respect of her claim for arrear maintenance and, on this ground, the appeal must fail.

To turn to the first ground of appeal. The Commissioner has given no reasons for the finding—included in his judgment—that the plaintiff was entitled to arrear maintenance from the date of the summons. I am unable to discover from his written judgment any basis on which such a finding could have been arrived at and it is inconsistent, in my view, with his finding that she had failed to prove what it had cost her to maintain the child. In view of this latter finding she could not succeed in any claim for maintenance at all if such claim is regarded as being one for indemnification of expenditure incurred by her and she must fail on the claim for maintenance as from the date of the summons just as she fails on the claim for arrear maintenance.

Craig and Van der Westhuizen, Members, concurred.

For Appellant: Adv. T. Juul instructed by Christopher, Walton Tatham.

Respondent in default.

SOUTHERN BANTU APPEAL COURT.

FATYELA vs. FATYELA.

CASE No. 25 OF 1965.

KING WILLIAM'S TOWN: 27th September, 1965. Before N. P. J. O'Connell, President, Potgieter and Louw, members of the Court.

PRACTICE AND PROCEDURE.

Evidence adduced—contradictory or at variance with pleadings—Court should adjudicate.

Summary: The true issue between the parties emerged from the evidence and was fully canvassed by them. Because this issue was not pleaded and was at variance with the pleadings, the judicial officer refused to adjudicate thereon and based his judgment on the original pleadings.

Held: Where the evidence adduced discloses that the true issue between the parties is something different from that covered by the pleadings and the parties have fully canvassed such issue the Court should adjudicate on the new issue notwithstanding that it is at variance with or contradicts the original pleadings. The true test is whether the parties, or one of them, will suffer prejudice in consequence of such action on the part of the Court.

The dictum in *Mabaso versus Mabaso* 1960 N.A.C. 52 (N.E.) was dissented from.

Cases referred to:—

Mabaso versus Mabaso, 1960, N.A.C. 52 (N.E.).
Cornelius and Sons versus McClaren, 1961 (2), S.A. 604.
British Diesels Ltd. versus Jeram and Sons, 1958 (3), S.A. 605.

O'Connell, President (delivering the judgment of the Court):—

The plaintiff (now respondent) sued the defendant (now appellant), the eldest son of her marriage by Christian rites to the late Pita Fatyela, for R50, the value of a red ox, her property, sold by him without her permission, and delivery of seven head of cattle, her property, unlawfully in his possession which he refused to hand over to her and costs.

Prior to the actual trial, the defendant was unrepresented. He entered appearance to defend the action and filed a plea which reads:—

"1. Ad. paragraphs 1 to 3 admitted by Defendant.

2. *Ad. paragraph* 4.—Plaintiff is not the owner of the said cattle but these cattle belonged to one, Lindwayo Fatyela, an unmarried late sister of Pita Fatyela.

3. Defendant sold his own property and therefore did not have to have permission from Plaintiff or anybody else.

4. Defendant is in lawful possession of the seven head of cattle belonging to the said Lindwayo Fatyela—by succession."

The evidence established that the red ox and three other cattle were, in fact, the property of the defendant and at the close of the plaintiff's case the claim was, by agreement, reduced to four head of cattle only, namely, a ncakozi cow and its red heifer calf (now cow) and their progeny. It had been put to the plaintiff in cross-examination that she had appropriated to herself R36, the property of the defendant, that she had agreed to give him the ncokazi cow and its red heifer calf in settlement of his claim for the R36 and that she had personally attended the dipping tank in 1960 and transferred these cattle to his name. She denied all these allegations. For convenience' sake, the defence was then permitted to call the Headman who deposed that he was present when, in complaint proceedings before the Magistrate, the plaintiff admitted she had taken R36 from the defendant's pocket and, because she did not have the money, had agreed that he could have the cow and calf instead. He stated further he was present at the dip when the plaintiff instructed the dipping foreman to transfer the two animals, plus three others from Lindwayo's estate, to the defendant. The case was then postponed. On its resumption, the plaintiff closed her case without calling further evidence and the following note was made in the record of proceedings: "Parties present as before. *Mr. Kelly* closes his case. By agreement the claim is reduced to four head of cattle only, that is the ncokazi cow, and its red heifer calf, now cow, and their progeny. The ncokazi cow and red heifer calf are those claimed to have been given by plaintiff to defendant for the alleged R36 which plaintiff was said to have taken from defendant's pocket. *Mr. Kobus:* 'I will now try to prove that these cattle were actually given to defendant by plaintiff to refund the R36'". The defence case then proceeded and at its close the judicial officer entered judgment for the plaintiff for four head of cattle and costs. Against this judgment the defendant has appealed on the following grounds:—

"1. That the judgment is bad in law and against the weight of evidence.

2. That the Assistant Bantu Affairs Commissioner erred in rejecting the whole of defendant's evidence and that of his witnesses.

3. That the Assistant Bantu Affairs Commissioner erred in his interpretation of Rule 44 (9) of the B.A.C.C. Rules and in not accepting that when defendant's attorney stated, at the beginning of the defence case, what the defence case was, he was in fact, pleading *viva voce* in terms of the said Rule.

4. That the Assistant Bantu Affairs Commissioner erred in finding that Plaintiff had proved her claim to the four cattle for which she was granted judgment."

In respect to the third ground of appeal, it must be pointed out that it is rule 45 (9) that governs the pleading of a new defence *viva voce* at the trial and not rule 44 (9) as is stated both in the notice of appeal and in the judicial officer's reasons for judgment. Rule 44 deals with exceptions and motions to strike out and has but *two* sub-rules. The exercise of a little care in these matters will obviate the unnecessary inconvenience and waste of time occasioned by such errors.

The judicial officer states in his reasons for judgment that he found for the plaintiff because "the defendant failed to prove his pleadings in the absence of an application to amend his plea". He held that, though it might have been a good defence had it been pleaded, the new defence raised was not cognizable by him because there was no formal application to amend in terms of the relevant rule an also because, on the authority of the dictum in *Mabaso versus Mabaso*, 1960 N.A.C. 52 (N.E.), it contradicted the original plea.

But in reaching this conclusion the judicial officer has not given due weight to the facts that the plaintiff knew from a very early stage what the real defence was, that she made no attempt to restrict the inquiry to the limits of the original plea but was prepared to meet the new case and, in fact, canvassed it fully, and that after the close of the plaintiff's case and the amendment to her claim, the true issue between the parties, and to which they thereafter confined themselves, was whether or not the plaintiff had transferred to the defendant the ncokazi cow and its heifer calf in settlement of his claim for R36. That this was indeed the case was freely conceded before us by Mr. Kelly who appeared for the plaintiff both in this Court and in the court *a quo*. In the light of the aforegoing this Court holds that the judicial officer erred in ruling that he was debarred from adjudicating on the new issue; he should have treated the remarks of the defendant's attorney at the close of the plaintiff's case as a *viva voce* application to amend the plea, the more so because the plaintiff's attorney raised no objection and confined his cross-examination of the defence witnesses to that issue. The remarks of *van der Riet, J.*, in *Cornelius and Sons versus McClaren,* 1961 (2) *S.A.* 604, where he is reported at page 606 as saying " a trial action is not a game of forfeits but an administration of justice upon the proved facts " are here most apposite. They are also in accord with the underlying spirit of section *fifteen* of this Court's constituent Act which enjoins that, in the absence of prejudice, technicalities should be ignored.

The dictum in *Mabaso versus Mabaso,* 1960 N.A.C. 52 (N.E.) that " while a court may allow evidence to wander from the plea and arrive at a decision on the evidence, such latitude cannot be permitted when the evidence contradicts the plea " has been quoted by the judicial officer as additional authority in justification of his ruling. This Court is, with respect, unable to agree with that dictum but, on the contrary, holds that the true test is whether either or both parties will suffer prejudice if an issue emerging from the evidence but not covered by the pleadings be adjudicated on by the court and that, if there be no likelihood of prejudice and such issue is, in fact, the true issue between the parties and has been fully canvassed by them, the court should adjudicate thereon irrespective of whether the new issue is or is not in conformity with the pleadings and whether or not it has been pleaded. *Finiet litis.* In this regard, this Court is in respectful agreement with *Broome,* J.P., when he says in *British Diesels Limited versus Jeram and Sons,* 1958 (3) S.A. 605 at page 606:—

> " If it should appear that any substantial issue was duly canvassed in the court below, then in my opinion we ought to regard it as an issue to be decided between the parties whether it has been pleaded or not ".

On the merits, the probabilities favour the defendant's version and no good reason has been advanced why the Headman and the Dipping Supervisor should be disbelieved when they say that it was the plaintiff herself who authorised the transfer of the ncokazi cow and its heifer to the defendant in 1960. The same applies to the Headman's evidence that in his presence the plaintiff agreed to hand the cattle over in settlement of the debt when the complaint was investigated by the Magistrate.

The appeal is upheld, with costs, and the judgment of the court *a quo* is altered to read " For defendant with costs."

Potgieter and Louw, Members, concurred.

For Appellant: Mr. C. M. Kobus.

For Respondent: Mr. H. J. C. Kelly.

CENTRAL BANTU APPEAL COURT.

MABUYA vs. MUBITWA.

CASE No. 11 OF 1965.

JOHANNESBURG: 16th June, 1965. Before R. S. G. Gold, President, and Messrs. J. R. Thorpe and J. Lambrechts, Members of the Central Bantu Appeal Court.

MUNICIPAL LOCATION.

Site permit holder—locus standi *to eject occupant of site before delivery.*

Summary: Appellant was the registered site permit holder of a stand in a municipal location in Johannesburg. Respondent was in occupation of that stand at the time the site permit was issued to appellant. Appellant sued respondent for an order ejecting the latter from the premises.

Held: A site permit holder has no *locus standi* to take ejectment proceedings until the property has been delivered to him by the Municipality.

Held further, the mere issue of a site permit does not constitute delivery.

Held further, the Municipality is obliged to give *vacua possessio* to the person to whom it issues a site permit.

Cases referred to:

Makue versus Makue's Trustee, 1923, T.P.D. 163.
Chili versus Spotane, 1937, N.A.C. (N. & T.) 134.
Ntuli versus Tshabalala, 1939, N.A.C. (N. & T.) 158.
Lusiti versus Goniwe, 1947, N.A.C. (C. & O.) 121.
Tshandu versus City Council, Johannesburg, 1947 (1) S.A. 494.
Nyembe versus Masiteng, 1948, N.A.C. (C.D.) 31.
Madikane versus Masoka, 1949, N.A.C. (S.D.) 113.
Armitage N.O. versus Mtetwa, 1950 (1) S.A. 439.
Shander versus Thelesi, 1951, N.A.C. (C.D.) 49.
Sheshe versus Vereeniging Municipality, 1951 (3) S.A. 661.
Nkwana versus Hirsch, 1956 (2) S.A. 219.
Kruger versus Monala, 1953 (3) S.A. 266.
Nkwana versus Hirsch, 1956 (4) S.A. 450.
Serobe versus Koppies Bantu School Board, 1958 (2) S.A. 265.

Appeal from the Court of the Bantu Affairs Commissioner, Johannesburg.

POSTEA: 27th August, 1965.

Gold, President, delivering the judgment of the Court:—

In an application in the Court of the Bantu Affairs Commissioner, the applicant (now appellant) averred:—

" 1. Your Petitioner is *Wilfred Mabuya,* of c/o 434, Mofolo Village, Johannesburg.

2. The Respondent is *Paulus Mubitwa,* of 838, Mofolo Central, Johannesburg.

3. Your Petitioner and Respondent are both Natives.

4. Your Petitioner is the registered tenant and Site Permit holder of Stand 838, Mofolo Central. Your Petitioner will, at the hearing of this matter, produce to the Court your Petitioner's Certificate of Title to the said Site.

5. Respondent is in wrongful and unlawful occupation of the said site.

6. Notwithstanding due demand the respondent fails to vacate the said premises.

Wherefore your petitioner prays that it may please this Honourable Court to grant—

(*a*) An order of ejectment against the respondent, together with all persons holding through him, from Site 838, Mofolo Central, Johannesburg;

(*b*) Alternative relief;

(*c*) Costs."

The respondent's replying affidavit reads:—

"I, the undersigned, *Paulus Mubitwa* of No. 838, Mofolo Village, the above-named respondent, do hereby make oath and say:—

1. That I have received and had read to me the Affidavit by the applicant in this matter.

2. That I deny that the applicant is the lawful registered tenant and site permit holder of Stand 838, Mofolo Central and I further deny that I am in wrongful and unlawful occupation of the said site.

3. I deny that the applicant is entitled to an order for my ejectment from the said site No. 838, Mofolo Central.

4. That on or about the 23rd October, 1961, in case No. 714/61 brought against me by my former wife, Florence Mubitwa, this Honourable Court granted a default judgment against me and appointed Mr. Benjamin Edgar Leo of Johannesburg to be the Receiver and Liquidator of the assets of the joint estate of myself and my former wife. That on 2nd January, 1962, this Honourable Court issued a Certificate of Appointment to the said Mr. B. E. Leo.

5. That the said Mr. B. E. Leo in his aforesaid capacity wrongfully and unlawfully failed to ascertain what assets were possessed by me and my former wife prior to our marriage and what assets were contributed to the joint estate. That thereafter, the liquidator, without my consent, as by law required, proceeded to sell by private treaty all my right, title and interest in and to the site permit No. 838, Mofolo Central and the buildings and improvements thereon belonging to me. That the site permit of site No. 838 Mofolo Central with the buildings and improvements thereon, were purchased and acquired by me prior to my marriage to my former wife Florence Mubitwa at Johannesburg on 14th February, 1957, and was not an asset in the joint estate which the said Mr. B. E. Leo in his said capacity was entitled to sell and dispose of. My former wife, Florence Mubitwa made no contribution to any assets whatsoever to our joint estate.

6. I therefore pray that this Honourable Court will refuse and dismiss the Petition by the applicant and further make an Order declaring the alleged sale and transfer of my site permit and the buildings on the property to the applicant to be null and void *ab initio* and that the applicant be ordered to pay the costs of this Application".

The Bantu Affairs Commissioner ordered the matter to go to trial, the applicant to be plaintiff, the responden to be defendant and the notice of application to stand as summons. The matter was thereupon postponed.

At the hearing, the only witness called was the Superintendent of Mofolo Location, Johannesburg, who testified that appellant was the registered holder of the certificate of title of Stand No. 838, Mofolo Central and that the rights of previous holder, the defendant in this action, had been cancelled. The transfer to appellant had been effected by the duly appointed Liquidator of the joint estate of defendant and his former wife who had divorced him.

The Bantu Affairs Commissioner relying on the decision in *Shander versus Thelesi,* 1951 N.A.C. (C) 49, held that there was no *vinculum juris* between plaintiff and defendant and dismissed the application, with costs.

Appeal is brought to this Court on the grounds that:—

"1. The Presiding Officer should have found that in terms of the Regulations only the plaintiff and persons having his permission are entitled to reside on or occupy the said Stand (838, Mofolo Central).

2. The Court should have found that in the circumstances the defendant was not entitled to reside on or occupy the said Stand and that his occupation was wrongful and unlawful.

3. The Court should have found that the plaintiff was entitled to claim that the defendant be ejected from the premises (together with all persons holding through him).

4. The Court erred in finding that there was no *vinculum juris* between the plaintiff and the defendant.

5. The Court erred in finding that the material facts herein are similar to those in the case of *Shander versus Thelesi.*

6. The Court should have granted the plaintiff's claims as prayed."

The Bantu Affairs Commissioner took judicial notice of the regulations applying to Municipal Bantu Locations in Johannesburg. He should not have done so. [*Serobe versus Koppies Bantu School Board,* 1958 (2) S.A. 265.] By consent, the official Gazettes (Nos. 802 of 4th March, 1925, and 2150 of 29th June, 1949) containing the regulations were produced and handed in at the hearing of the appeal.

Mr. Smits, who appeared in this Court for the respondent, submitted that the facts in the instant case are on all fours with those in *Shander's* case (above) which, he argued, had been correctly decided. The facts are, indeed, practically indistinguishable.

This Court is aware, however, that *Shander's* case is not being followed and that orders for ejectment are being granted to applicants who hold certificates of title, on the authority of, *inter alia,* the cases:—

Chili versus Spotane, 1937, N.A.C. (N. & T.) 134
Ntuli versus Tshabalala, 1939, N.A.C. (N. & T.) 158
Lusiti versus Goniwe, 1947, N.A.C. (C. & O.) 121
Nyembe versus Masiteng, 1948, N.A.C. (C.D.) 31
Madikane versus Masoku, 1949, N.A.C. (S.D.) 113.

It becomes necessary, therefore, to investigate whether an ejectment order may be granted in the circumstances of the present case.

The decision in *Shander's* case was based on *Tshandu versus City Council, Johannesburg,* 1947(1) S.A. 494.
In both cases, (the names are the same; the correct spelling is "Tshandu"), the site permit, issued by the Superintendent, was looked upon as evidencing a contract of lease at common law, giving to the site permit holder only those rights he would have had under such a contract, so that, in the words of Marsberg (President) in *Shander's* case: "The mere issue of the site permit in plaintiff's favour did not constitute delivery of the property, without which he could have no rights *in rem*" — and, therefore no right to sue for an order of ejectment.

(There appears to be no difference between the "site permit holder" of the cases and the "holder of a certificate of title" of the regulations.)

The view that a site permit holder is no more nor less than a common law lessee of the Council has been modified by subsequent decisions; the difficulty is to determine in what respect, and how far, a site permit holder's rights differ from a common law lessee's.

In *Kruger versus Monala,* 1953(3) S.A. 266 de Wet, J. (as he then was) said, in referring to *Tshandu's* case: "I do not think that the learned judge meant to say that there was an actual relationship of landlord and tenant equivalent to the common law relationship", i.e. between the site permit holder and the City Council.

In this case (*Kruger versus Monala*), it was decided that, although the interest in property held under a site permit resembles the interest under a lease, it shows differences that take it out of the operation of Section 68 (3) of the Magistrates' Courts Act, No. 32 of 1944. This decision seems to indicate that the interest of a site permit holder falls short of that of a lessee. However, the point was left open on appeal and in the later case of *Nkwana versus Hirsch,* 1956(4) S.A. 450, the Appellate Division expressly doubted the reasoning of the Transvaal Provincial Division in *Kruger versus Monala,* seemingly inclining to the view that the interest of a site permit holder was indeed that of a lessee. The Court did not find it necessary to resolve the doubt. In *Armitage N.O. versus Mtetwa* decided in 1946 but reported in 1950(1) S.A. 439, it was laid down that a lawful permit holder becomes a statutory tenant of the Council. Commenting on this statement in *Nkwana versus Hirsch,* 1956(2) 219 at page 222, de Wet, J. said: "I do not quarrel with this view, but whereas the statutory tenant under the Rents Act has no right to dispose of or to assign his rights of occupation, the appellant . . . has this right". Again, in *Kruger versus Monala* (above) the same learned Judge said: "In *Armitage N.O. versus Mtetwa* . . . it is stated . . . that the lawful permit holder becomes a statutory tenant of the Council with rights and duties prescribed by the regulations. This appears to me to be a correct description of the relationship between the permit holder and the Council".

In *Sheshe versus Vereeniging Municipality,* 1951(3) S.A. 661 at p. 669 van den Heever, J.A. said: "It is clear that the granting of a site permit is in itself not a lease . . . The act which constitutes the lease — in so far as it is a lease — is the allotment to the holder of the permit of his site on the understanding that he will comply with the requirements of the regulations".

However, the Court dealt with the issue partly on the basis that the Council, being owner of the land, was in the position of landlord and the site permit holder in the position of tenant.

From these authorities there seems to be no doubt that the relationship of the Council to the site permit holder is that of landlord and the relationship of the site permit holder to the Council is that of a statutory tenant, with certain additional rights conferred by statutory regulations.

Now, if a site permit holder does indeed have the right to take ejectment proceedings, before the leased property has been delivered to him, against a person who occupies the property, it is necessary to inquire from whence that right is derived. It does not come from the common law under which the tenant, until he receives possession, is limited to an action against the landlord. It can, therefore, if it exists at all, flow only from the regulations applicable to Municipal Locations. Mr. Helman, who appeared in this Court for the appellant (plaintiff) submitted that because the regulations give the site permit-holder a right of occupation, he must be able to enlist the aid of the Court to enforce that right. The regulations applicable to Mofolo Native Village are contained in Administrator's Notice No. 381 of 1949.

As van der Heever, J.A. said in *Sheshe versus Vereeniging Municipality* (above): "Considered as a statutory tenancy, it is trite law that statutes must be construed in conformity with the common law unless a contrary intention emerges".

This Court has been unable to find in the Regulations any provision modifying the common law to the extent that a site permit-holder who has not himself been placed in possession of the leased property has the right to eject an occupier of that property.

The Court's attention was invited to Regulation No. 3(1) which reads: "The holder of a certificate of title to a lot in a Native village, who is registered as such in the Registry of Certificates of Title relative to that village to be kept by the Council, shall be . . . entitled . . . to the exclusive use and occupation of the lot described therein".

Bearing in mind that the basic relationship between the site permit-holder and the Council is one of landlord and tenant, Section 3(1) of the regulations goes no further, in our view, than to lay down the tenants' rights and duties, once he has been placed in possession of the leased property by the landlord. In our opinion, it does not give him the right to take upon himself the duty of his landlord and to eject an occupier of the leased premises before he has been put into possession, any more than such a right is conferred on a lessee under a common law contract containing a clause granting to him the exclusive use and occupation of the leased property.

It is true that in the case of *Makue versus Makue's Trustee,* 1923, T.P.D. 163, the Court granted an order of ejectment in favour of the site permit holder's trustee who had transferred the insolvent holder's rights to a purchaser. That case was decided, however, before the relationship between site permit-holder and Council had been investigated and determined in the cases quoted above and received approval in *Nkwana versus Hirsch,* 1956(4) 450 only on the limited points that the site permit holder's rights are transmissible and may be disposed of through an officer of the Court.

The Court comes to the conclusion that *Shander's* case was correctly decided and that there is vested in the plaintiff in the instant case no right to claim the ejectment of the defendant.

By issuing a site permit or certificate of title, the Council accepted the plaintiff as its new tenant; the position is not affected by the fact that the plaintiff obtained his right to apply for a certificate of title by entering into a deed of sale with some other person. Having accepted the plaintiff as its new tenant, it is for the Council to give that tenant *vacuo possessio*, as was made clear in *Armitage N.O. versus Mtetwa* (above). The regulations have been amended since the decision in *Armitage's* case but that fact does not disturb the principle laid down in both *Tshandu's* and *Armitage's* case that the new tenant must be given *vacuo possessio*.

The appeal is accordingly dismissed, with costs.

Thorpe and Lamprechts, Members, concurred.

NORTH-EASTERN BANTU APPEAL COURT.

MHLUNGU vs. MHLUNGU.

CASE No. 74 OF 1964.

ESHOWE: 13th April, 1965. Before Cowan, President, Craig and Colenbrander, Members.

ZULU LAW AND CUSTOM.

Grave of ancestor—sacrosanctity.

Summary: The grave of the paternal grandfather of the parties was given certain attention by Defendant, who was the *ikohlo* heir of the parties' father, without the consent of the *indhlunkulu* heir. Plaintiff sued Defendant for and was awarded damages for the acts of the latter.

Held: That the care of an ancestor's grave is the prerogative of the general heir and that he was entitled to damages.

Appeal from the Court of the Bantu Affairs Commissioner, Nqutu.

Cowan, President:—

This action has its inception in a Chief's Court where the plaintiff (the present respondent) sued the defendant (appellant) for "R100 damages for making disturbance on plaintiff's grandfather's grave after having been warned not to". The particulars of defence are recorded as "Alleges that it was by plaintiff's consent". Judgment was given for the plaintiff for R8 and costs, and the defendant appealed against this judgment to the Bantu Affairs Commissioner. This appeal was unsuccessful and he now appealed to this Court against the Commissioner's judgment which confirmed that of the Chief.

In the Commissioner's Court the point was taken *in limine* that the claim in the Chief's Court disclosed no cause of action but this objection was dismissed by the Commissioner and the case proceeded on the pleadings as recorded in the Chief's Court.

The plaintiff's claim that he was the general heir of the late Mazwi and that defendant was the heir in the *ikohlo* house was not challenged and it was common cause that the defendant had removed the original stones which had been placed on Mazwi's grave and had replaced these with flat stones which he had cemented together and white washed and had erected a stone fencing post as a headstone. On the evidence, the Commissioner found—rightly in our opinion—that this was done without the consent of the plaintiff.

No decided cases having a bearing on a claim of this nature were quoted by counsel nor have we been able to find any and the assistance of Bantu assessors was invoked. The questions put to them and their replies are appended to this judgment.

This Court is in agreement with the views of the assessors that the care of an ancestor's grave is the prerogative of the general heir and that any usurpation of this prerogative would be contrary to custom and an impairment of his dignity. Such a usurpation would therefore be a wrongful act in terms of Section 130 of the Natal Native Code and found an action for damages.

The appeal accordingly falls to be dismissed with costs.

Craig and Colenbrander, Members, concurred.
For Appellant: Mr. B. Wynne instructed by Mr. H. L. Myburgh.

For Respondent: Mr. W. E. White instructed by Messrs. A. C. Bestall & Uys.

ADDENDUM.

OPINION OF ASSESSORS.

Names of Assessors:

1. Gilbert George Mkize (Nongoma).
2. Chief Ephraim Ndwandwe (Eshowe).
3. Chief Siphoso Mpungose (Eshowe).
4. Ndesheni Zulu (Nongoma).

Question: Is it true Bantu custom that the grave of a Bantu ancestor is sacrosanct?

Reply: Yes. (Unanimous).

Question: On whom would the duty of guarding the sacrosanctity fall?

Reply: It is the duty of the heir of the deceased or the heir of the family. (Unanimous).

Question: That is the general heir?

Reply: Yes. (Unanimous).

Question: Does the grave continue to be sacrosanct after the *mbuyisa* ceremony?

Reply: That is so, it continues. (Unanimous).

Question: Are any steps taken to mark such grave?

Reply: Yes, it is fenced in with poles, and as poles rot in time some trees are planted. Usually Iminyela and all trees easily struck from cuttings are planted around the grave.

Question: If trees of this sort do not flourish in such area is the grave marked by stones?

Reply: A heap of stones is put on the grave and in addition the trees that are easily struck from cuttings.

Question: Who is the person responsible for taking such steps?

Reply: The general heir.

Ndesheni Zulu asks if the question refers to the building up of the grave and planting of trees only or so many years thereafter. He wants to know whether the question relates to the actual burial or many years after the time.

Question: Does any interference to the grave by anyone else constitute a crime in Bantu Law?

Reply: Gilbert Mkize: I say it is not a crime.

Chief Ephraim Ndwandwe: If there is need to go to the grave for anything any relative of the deceased may consult the general heir and then he can go and do what they have agreed upon. Anyone can go there only after consultation with the heir. If anyone goes and touches the grave or anything relating thereto, then he is committing an offence.

Chief Siphoso Mpungose: Anyone touching the grave without consulting the heir is committing an offence. He is regarded by other people as a person of dark practices. If anyone interferes with the grave or the ground, say setting fire, then he must pay something, some penalty to the general heir for such fires to the grave is taken by the heir as an offence because that is burning of dead people although they are buried. That might change the spirit of the deceased into a flaming ghost.

Ndesheni Zulu: I have nothing to add to what has already been said except that the offender is charged a beast which is killed and the gall fluid spilled over the particular grave to appease the spirit.

Question: Mr. Mkize, you originally replied in the negative to the question.

Reply: Gilbert George Mkize: Yes to the question as put, that is, that it is not an offence for any person to interfere with the grave. The question was whether it was a crime and I said no. I do not wish to amplify my reply at this stage.

Question: Mr. Ndwandwe used the words that if the grave is touched without the consultation of the general heir it would be an offence?

Reply: Chief Ephraim Ndwandwe: Yes.

Question: An offence in the sense of a crime?

Reply: Chief Ephraim Ndwandwe: Yes.

Question: Punishable by the Chief?

Reply: Chief Ephraim Ndwandwe: It is either the Chief to fine the man or the general heir of the deceased.

Question: If the general heir fails to take such steps as may be necessary to protect the grave, may any other member of the family do so?

Reply: Chief Ephraim Ndwandwe: If something goes wrong with the grave a relative of the deceased can go and put it right but after consulting the general heir. (Unanimous).

Chief Siphoso Mpungose: It often happens that the general heir is negligent. If he is found to be negligent then one of his relatives can repair the grave after consulting the family.

Question: And if a relative took steps to protect the grave without such consultation would that have the effect of lowering the general heir in the community's estimation?

Reply: Chief Siphoso Mpungose: Yes, Exactly. It lowers the dignity of the heir because he has failed to comply with custom or tradition.

Ndesheni Zulu: The man who gets up when he sees something going wrong at the grave is generally next in rank to the general heir and he does so not on his own right but as assisting the general heir.

Question: Does the fact that such a person is the heir to the *ikohlo* house give him any special rights in the matter?

Reply: Ndesheni Zulu: No, the *ikholo* does not have any such right by his status, he can only do what he wants at the grave after consultation with the general heir. (Unanimous).

Question: Is there anything you wish to add at this stage, Mr. Mkize?

Reply: Gilbert George Mkize: My original reply was that it is not a crime, but it is an offence against the customs and tradition of a Bantu and it does not entail a fine by the judicial authority, but only by the relative of the deceased so that the gall fluid can be spilled on the grave. If such a matter is taken to the Chief, he is usually ordered to leave the district to make him suffer a little. When a man is smelled out and regarded by the people as a person of dark actions he is punished for good, but if such a family dispute as Your Honours have been asking about is taken to the Chief, he is only asked to leave the immediate area.

Mr. White: If a person does anything wrong which lowers the dignity of the other person is it right that the other person can claim damages as a result?

Reply: Yes. (Unanimous).

Mr. Wynne: Does the claim for damages always consist of a beast or is it sound in money?

Reply: Zulus had no money. The usual form of payment for cleansing or so was a beast.

Mr. Wynne: Is it correct that in an instance like this the only form of damages which could be claimed was a beast for the gall fluid to be poured on the grave?

Reply: Yes. (Unanimous).

NORTH-EASTERN BANTU APPEAL COURT.

KUMALO vs. MHLONGO.

CASE No. 88 OF 1964.

ESHOWE: 14th April, 1965. Before Cowan, President, Craig and Colenbrander, Members.

PRACTICE AND PROCEDURE.

Lapsing of Chief's Judgment—late noting of appeal—condonation—certifying of copies of records.

Summary: A Chief's judgment had lapsed for want of registration Despite this an appeal against it was noted out of time and heard. The copies of the original record were duly certified but were, in fact, incorrect.

Held: That all proceedings in the Bantu Affairs Commissioner's Court were null and void.

Rules referred to:—

Chiefs' and Headmen's Civil Courts: Rules 7 (2) and 9.

Cases referred to:—

Ntombela versus Zungu, 1 N.A.C. (N.E.) 302.

Appeal from the Court of the Bantu Affairs Commissioner, Mtubatuba.

Craig, Permanent Member:—

The appeal in this case must succeed but not on the sole ground advanced *viz* that the judgment is against the evidence and the weight of evidence. The Court *suo motu* raised the point that the Chief's judgment had lapsed in terms of Chiefs' and Headmen's Civil Courts Regulation No. 7 (2) (Government Notice No. 2885 of 1951 as amended by Government Notice No. 886 of 1958).

It is noted that though the Clerk of the Court certified the copies of the original record as being true copies the endorsements which appear on the reverse of the Chief's Written Record were not shown on the copies of that document.

It is trusted that the attention of both the Chief and the Clerk of the Court will be drawn to their omissions which have resulted in unnecessary expense to both parties.

This Court is also constrained to remark that even had the Chief's judgment not lapsed the proceedings in the Bantu Affairs Commissioner's Court were null and void—*Ntombela versus Zungu,* 1 N.A.C. (N.E.) 302—as the appeal to that Court was out of time *vide* Chiefs' Courts Regulation No. 9 as amended and an extension in terms of *sub-section* (3) of the regulation was neither asked for nor granted.

The appeal is allowed with no order as to costs and all proceedings in the Bantu Affairs Commissioner's Court are set aside

Cowan, President, and Colenbrander, Member, concurred.

For appellant: Mr. W. E. White.

Respondent in default.

NORTH-EASTERN BANTU APPEAL COURT.

CELE vs. CELE.

CASE No. 89 OF 1964.

ESHOWE: 14th April, 1965. Before Cowan, President, Craig and Colenbrander, Members.

PRACTICE AND PROCEDURE.

Inadmissible evidence—letter from Chief, Natal Archives Depot.

Summary: A letter addressed by the Chief, Natal Archives Depot addressed to the Clerk of the Court concerned was admitted as evidence and relied on by the judicial officer trying the case.

Held: That this letter did not qualify for admission under the Evidence Act (Act No. 14 of 1962).

Held: That the admission of inadmissible evidence in a trial is not *per se* a ground for reversing the judgment of a lower court.

Legislation referred to:

Act No. 14 of 1962—Section 2.

Works referred to:

Jones and Buckle, " Civil Practice of the Magistrates' Courts of South Africa " at pages 269 and 270 and the authorities there cited.

Appeal from the Court of the Bantu Affairs Commissioner, Mtunzini.

The facts of this case are not important to this report and on other evidence available the appeal was dismissed.

Cowan, President, stated, *inter alia*:—

It appears that the register of civil cases head by Chiefs during the year 1936 had been sent to the archives and Exhibit " B " was a letter addressed by the Chief, Natal Archives Depot, to the Clerk of the Court incorporated in which there was what purports to be an extract from the register of the particulars of Case No. 98 of that year. These show, *inter alia,* that a case between Puzukufa Cele, who was the Plaintiff, and Fanezana Cele (Defendant) was heard by Chief Somshoko on the 29th April, 1936. The claim was for " five head of cattle and £10 cash and stock lent to Defendant by Plaintiff " and the judgment was " For Plaintiff for four head of cattle and £10 and costs ".

This letter does not qualify for admission as evidence in terms of section 2 (1) of the Evidence Act, 1962, nor does the record disclose anything which would indicate that it was admitted in terms of Section 2 (2). Even although its admission was not objected to, the Commissioner erred in relying on it in arriving at his finding.

The admission of inadmissible evidence in a trial is, however, not *per se* a ground for reversing the judgment of a lower Court and this Court will decide the appeal upon the admissible evidence as it is satisfied that this evidence suffices to leave no room for doubt that the Commissioner was in fact correct in allowing the appeal (see Jones and Buckle, Civil Practice of the Magistrates' Courts of S.A. at pages 269 and 270 and the authorities there cited).

Craig and Colenbrander, Members, concurred.

For Appellant: Mr. O. K. Mofolo.

For Respondent: Mr. W. E. White.

NORTH-EASTERN BANTU APPEAL COURT.

SHAKA XABA vs. SANDANEZWE XABA.

CASE No. 17 OF 1965

PIETERMARITZBURG: 25th May, 1965. Before Craig, Acting President, Fenwick and Neuper, Members.

PRACTICE AND PROCEDURE.
ZULU LAW AND CUSTOMS.

Appeal from Chief's Court—framing of Bantu Affairs Commissioner's judgment — failure to award costs — payment of "isondhlo"—reimbursement of "cleansing" animal slaughtered.

Summary: In a claim in a chief's court for cattle as "isondhlo" for certain three children and a goat used for "cleansing" a fourth child which died the chief awarded plaintiff nine head of cattle. On appeal the Bantu Affairs Commissioner entered a judgment of "absolution from the instance" and made no award of costs.

Held: that "isondhlo" was not payable by defendant in respect of the first child Hlekisile as he had no property rights in her.

Held: that one beast was payable by defendant in respect of each of the children Mandla and Bongani as he held the property rights in them.

Held: that defendant must reimburse plaintiff the goat which the latter slaughtered to "cleanse" the fourth child which died and which was the brother or sister of Bongani and Mandla.

Held: that this being an appeal the Bantu Affairs Commissioner's judgment was, *inter alia*, wrongly framed.

Cases referred to:

Hlongwane versus Hlongwane, 1956, N.A.C. (N.E.) 86.

Mpinga versus Mpinga, 1947, N.A.C. (N.E.) 81.

Mahaye versus Mabaso, 1, N.A.C. (N.E.) 280.

Mbata versus Zungu, 1949, N.A.C. (N.E.) 72.

Craig, Acting President:—

The Bantu Affairs Commissioner appears to have overlooked the fact that this was an appeal and has worded his judgment wrongly. His attention is directed to the cases of *Hlongwane versus Hlongwane,* 1956, N.A.C. 86 (N.E.) and *Mpinga versus Mpinga,* 1947, N.A.C. (N.E) 81. Further, he made no order in regard to the costs of the appeal in his Court but as the omission was not appealed against this Court will not interfere.

It is obvious that the claim for "isondhlo" for the girl Hlekisile is not well founded. She is the illegimate daughter of defendant by a woman Magwala and the property rights in her vest in the latter's family and not in defendant. He, accordingly, does not possess the necessary *locus standi in judicio* to be sued, see *Mahaye versus Mabaso* 1. N.A.C. (N.E.) 280.

The position in regard to Bongani and Mandla is different. They are the illegitimate children of defendant's daugther, Mabel, and the property rights in them are his, as far as can be ascertained from the record, and he may be sued. The record is silent as to the ages and sexes of these two children. It is indisputable that these children lived at defendant's kraal for upwards of six years and that for at least half of that period he was solely responsible for their upbringing and he was entitled to "isondhlo" in respect of them irrespective of the period of maintenance, *vide Mbata versuh Zungu,* 1949, N.A.C. (N.E.) 72. He should have been awarded a beast in respect of each such child. He cannot be said to have reared the deceased child as, according to its mother, it died when three days old so he is not entitled to "isondhlo" for it. He is, however, entitled to be reimbursed his goat which he used for cleansing when the child died.

It may be remarked, in passing, that neither of the parties had the legal right to marry off Hlekisile nor to receive lobolo for her nor to enter into any agreements regarding that lobolo. Neither is her guardian.

In the result the appeal is allowed with costs and the Bantu Affairs Commissioner's judgment is set aside and for it is substituted "The appeal from the Chief's Court is allowed and his judgment is altered to read "For plaintiff for two head of cattle and one goat, with costs".

Fenwick and Neuper, Members, concurred.

For Appellant: Adv. P. Hunt (instructed by Messrs. Acutt and Worthington).

For Respondent: Adv. N. Fuller (instructed by Messrs. Van Rensburg and Hellberg).

NORTH-EASTERN BANTU APPEAL COURT.

EVELYN NGWENYA D/ASS. BY LAWRENCE NGWENYA
vs.
SIBAKELA NDHLOVU.

CASE No. 16 OF 1965.

PIETERMARITZBURG: 26th May, 1965. Before Craig, Acting President, Fenwick and Neuper, Members.

Wife suing for damages as "eye" of the kraal—locus standi in judicio.

Summary: The plaintiff duly assisted by her husband sued for damages for the allegedly wrongful and unlawful impounding of the latter's cattle.

Held: That a woman, even if she is the "eye" of the kraal during her husband's absence at work, has no *locus standi* to sue in her own name.

Held: That action should have been instituted in his name or on his behalf and that all proceedings in the Bantu Affairs Commissioner's Court were void.

Cases referred to:

Sitelo Mdontsa versus Mkizana Fumbalele, 1946, N.A.C. (C. & O.) 68.

Appeal from the Court of the Bantu Affairs Commissioner, Ladysmith.

Fenwick, Member:—

(Only the material portion of the judgment is included in this report.)

The appeal in this case is brought by the plaintiff, a Bantu woman, and she sued in the Court *a quo* duly assisted by her husband.

The claim is one for damages arising from the impounding by defendant of certain cattle which plaintiff's husband says are his property. When these cattle were impounded plaintiff's husband was absent at work in Johannesburg and plaintiff says she was the "eye" of the kraal during her husband's absence. He did however attend Court and give evidence. It seems that plaintiff sued in her capacity as her husband's representative. In the case of *Sitelo Mdontsa versus Mkizana Fumbalele,* N.A.C. (C. & O.) 1946 at page 68 a similar representative relationship between the absentee owner of property and the person who sued was considered and there it was held that such person may not sue in a personal capacity but must sue in the name of or on behalf of the owner of the property. With that decision this Court respectfully agrees. In this case the owner of the cattle was readily available and any damage which was suffered was suffered by him and not by the plaintiff, and he is the person who should have instituted or been named as plaintiff, duly represented, in this action. The present plaintiff had no *locus standi* to sue for the damages which are the subject matter in the instant case in her own name so that all proceedings in the Bantu Affairs Commissioner's Court are void and must be set aside. The appeal must be allowed and as it hinged on a legal point raised *mero motu* by the Court there will be no order as to the costs of the appeal.

Craig, Acting President and Neuper concurred.

For Appellant: Adv. W. O. H. Menge (instructed by Messrs. Kidman and Botha).

Respondent in person.

NORTH-EASTERN BANTU APPEAL COURT.

SHANGE AND DHLAMINI vs. MDHLALOSE.

CASE No. 9 OF 1965.

ESHOWE: 6th July, 1965. Before Craig, Acting President, Harvey and Zylstra, Members of the Court.

MESSENGER OF CHIEF'S COURT.

Cattle attached in pursuance of Chief's judgment and handed over to execution creditor—messenger sued for return of cattle—non-liability.

Summary: The two defendants were sued jointly and severally for the return of cattle which had been attached by second defendant in his capacity as a messenger of a Chief's Court and handed over to first defendant. The Bantu Affairs Commissioner gave judgment against both defendants as prayed.

Held: That in the circumstances disclosed an action such as this against a Court messenger was not competent.

Case referred to:

Ndumba versus Zewedu, 1924, N.H.C. 47.

Work referred to:

Stafford and Franklin "Principles of Native Law and the Natal Code", pages 252-253.

Appeal from the Court of the Bantu Affairs Commissioner, Nqutu.

Craig, Acting President:—

Plaintiff sued the two defendants, jointly and severally, in the Bantu Affairs Commissioner's Court for the return of six head of cattle, or their value R255, which were allegedly removed wrongfully and unlawfully from his kraal during his absence at work. Plaintiff went on to allege that there was no judgment against him which permitted the attachment or removal of his cattle.

It appeared from the record that the cattle concerned were attached by the second defendant who is a Chief's messenger at the instance of the first defendant in settlement of a Chief's judgment in favour of the latter against one Mndaweni Mdhlalose, a half brother of plaintiff.

Shortly, in their joint plea the defendants admitted attaching five head of the cattle and averred that the sixth was a suckling calf which followed its mother. They denied liability on the grounds that the cattle were seized lawfully in settlement of a Chief's judgment, that second defendant acted in his capacity as a Chief's messenger, that first defendant pointed out the cattle to be attached and that such cattle were the property of Mndaweni Mdhlalose against whom first defendant had a judgment for four head of cattle and costs.

After hearing, the Bantu Affairs Commissioner entered judgment of:—

> "For plaintiff for six head of cattle or their value the sum of R255 and costs of suit, one defendant paying, the other to be absolved. Court declares Ndaweni, Ka-Mwelase and Simon Mbata to be necessary witnesses".

In the joint "Notice of Appeal" the defendants have brought the matter on appeal to this Court as follows:—

> "Please take notice that the above-named defendants hereby note an appeal against the whole judgment granted by the Bantu Affairs Commissioner on the 27th October, 1964, in the above case, on the following grounds:—
>
> *By first appellant (first defendant):*
>
> 1. The judgment is against the evidence and weight of evidence.
>
> 2. First appellant avers that he did not remove respondent's cattle personally nor did he remove them forcefully but cattle were handed to first appellant by the Local Chief's Court messenger in satisfaction of a Chief's judgment which was for plaintiff/appellant for four head of cattle plus costs.
>
> 3. First appellant further avers that the cattle which were attached by the Chief's Court messenger were in fact, attached at the kraal of Mndaweni Mdhlalose and not at the kraal of the plaintiff.
>
> *By second appellant (second defendant):*
>
> 1. The judgment is against the evidence and the weight of the evidence.
>
> 2. Second appellant is a duly appointed messenger of Acting Chief John Shange for the district of Nqutu.
>
> 3. Second appellant in this action was sent by Acting Chief John Shange to attach certain cattle belonging to one Mndaweni Mdhlalose and the Chief's messenger acted as was instructed by Acting Chief John Shange.
>
> 4. Second appellant had no interest whatsoever in the whole action but acted in th execution of his lawful duties."

At the hearing of the appeal before this Court the first appellant was in default and accordingly his appeal fell to be regarded as having lapsed for want of prosecution and to be struck off the roll.

In regard to the appeal of the second appellant who appeared in person, Mr. White, who appeared for the respondent, conceded, rightly, that he was unable to advance any argument against such appeal.

It is not disputed that second defendant is a Chief's messenger and it is clear that he made the attachment, despite Ka-Mwelase's statement to the effect that he was not there at the time. He admitted having attached the cattle in his official capacity and handed them over to the first defendant who, in turn, admitted having received and disposed of them. In these circumstances an action for the return of the cattle as against second defendant is insupportable—*Ndumba versus Zewedu*, 1924, N.H.C. 47 and Stafford at pages 252-253—and no judgment against him on the grounds set forth in this case was competent. The appeal of second defendant must succeed.

In the result the appeal of the first appellant is deemed to have lapsed for want of prosecution and is struck off the roll with costs.

The appeal of the second appellant is upheld with the costs incurred by him in appealing and the Bantu Affairs Commissioner's judgment so far as it relates to him is altered to read "For second defendant with the costs incurred by him in defending this action".

Harvey and Zylstra, Members concurred.

Appellant No. 1 in default.

Appellant No. 2 in person.

For respondent: Mr. W. E. White (Instructed by Van Rensburg and Hellberg).

NORTH-EASTERN BANTU APPEAL COURT.

NGIDI vs. CIYA.

CASE No. 91 OF 1964.

ESHOWE: 8th July, 1965. Before Craig, Acting President, Harvey and Zylstra, Members of the Court.

COMMON LAW.

BANTU LAW

Damage by domesticated animal—common law—vicious propensities—Bantu law.

Summary: Defendant's bull gored plaintiff's heifer and it died a few days later of the injuries inflicted. Plaintiff sued for R28 damages and the Bantu Affairs Commissioner entered a judgment of absolution. The Commissioner did not state under what system of law he tried the case.

Held: by the majority of the Court, that the case had been tried under the common law and that plaintiff should have been awarded judgment as prayed.

Held: by the minority of the Court, that the case had been tried under Bantu law and under that system plaintiff was entitled to suceed.

Cases referred to:

Yako versus Beyi, 1948 (1), S.A.L.R. 388.
Mkhize versus Sikakane, 1959, N.A.C. 3.

Works referred to:

Maasdorp (1963), Vol 4, page 47, *et seq.*
Stafford and Franklin "Principles of Native Law and the Natal Code", page 226.

Appeal from the Court of the Bantu Affairs Commissioner, Mapumulo.

Harvey, Member:

Plaintiff (appellant) sued defendant (respondent) in the Court below for R28 damages.

His claim reads:—

"On or about January, 1959, plaintiff's beast, a heifer valued at R28 while being driven to the dipping tank with other cattle was gored and fatally injured by defendant's bull.

Plaintiff's claim is for payment of the sum of R28 being the value of the heifer, which notwithstanding demand, defendant fails, refuses or neglects to pay.

Wherefore by reason of the premises plaintiff prays for judgment as follows:—

(1) Payment of the sum of R28;

(2) Alternative or other relief;

(3) Costs of suit."

The Bantu Affairs Commissioner entered an absolution judgment against which this appeal has been noted.

The grounds for appeal are:—

"The learned Assistant Bantu Affairs Commissioner ought on the evidence to have found in favour of the plaintiff.

The learned Assistant Bantu Affairs Commissioner ought on the evidence and the inferences to be drawn therefrom, have held that the defendant was aware of the savage nature of her bull as its previous propensities would be more particularly in the knowledge of the owner than of others and ought to have been inferred from:—

(*a*) Her son the herd-boy's shouted warning.

(*b*) Her denial that at the time of the incident the animal was a bull.

(*c*) Her causing the bull to be castrated shortly thereafter.

(*d*) Her abusive and threatening attitude to plaintiff's wife.

(*e*) Her refusal to comply with the Induna's request to see him.

(*f*) Her refusal to accompany the Induna's Messenger."

The Bantu Affairs Commissioner in his reasons for judgment writes:—

"Although it has been proved that the heifer of plaintiff was fatally injured by the bull of defendant, it has not been proved that defendant or the herd-boy of defendant was aware of the vicious propensities of this animal and if that was the case, there was no negligence on the part of defendant in allowing her bull to mix freely with cattle of other stock owners at the dipping tank. Cabuzile Ngidi, second witness for plaintiff, states that he has never seen this particular bull injure another beast."

Mr. White, in addressing the court, quite rightly pointde out that the claim makes no allegation of negligence nor was it incumbent on plaintiff to allege or prove negligence in order to succeed as this action lies at common law for damages irrespective of whether the bull was of a vicious nature or not. He accepted the position that unless it can be proved under circumstances like this that the owner had knowledge of a tendency of her bull to act as it did no action lies in Bantu law (Stafford page 226).

In this case, the action is brought under common law as there is no mention to the contrary on the record *vide Yako versus Beyi,* 1948 (1), S.A.L.R. 388. That being the case, and since it is common cause that the defendant's bull did cause the death of plaintiff's heifer in the manner alleged plaintiff is entitled to succeed. Maasdorp (1963), Vol. 4, page 47, *et seq.*

The appeal is accordingly upheld with costs and the judgment of the Bantu Affairs Commissioner altered to one for the plaintiff as prayed with costs.

Zylstra, Member, concurred.

Craig, Acting President:—

I agree that the appeal must be allowed with costs and judgment entered for plaintiff as prayed with costs but I am reluctant to follow the route traversed by my brethren in arriving at that destination.

The plaintiff, appellant, alleged in his summons that his heifer, which he valued at R28, was gored and fatally injured by the defendant's (respondent's) bull while it was being driven with other cattle to the dipping tank. He claimed the sum of R28 or alternative relief. The defendant (she is an emancipated woman) denied these allegations in her plea and put the plaintiff to their proof.

The only testimony of the circumstances attending the infliction of the injury was that of the plaintiff's son, Cabuzile, and his evidence in chief was, briefly, to the following effect: He was taking the plaintiff's cattle to the dipping tank on a Thursday in January, 1959, when the defendant's cattle came from behind and their herd-boy, Sitobela Ciya, "chased the cattle to mix with mine '. Sitobela cried out to him to look out "because this bull of ours has gored other cattle" and, while he was asking Sitobela why he allowed such cattle to mix with his, he saw the bull goring the heifer in its left side. He says that the animal died the following Saturday. He was cross-examined about the evidence he had given in an action between the two parties two years previously and agreed that the facts were fresher in the memory then and conceded that he had then said in evidence that Sitobela had shouted, "mind the bull is going to injure your cattle" and that this was all he had said.

The judicial officer has not recorded—which he should have done—under what system of law he tried the action but it would seem that he applied Bantu law, because, although he accepted that the heifer had been fatally injured by the defendant's bull, he entered an absolution judgment because he held that it had not been proved that defendant or herd-boy was aware of the vicious propensities of the animal and he goes on to say, "and, if that was the case. there was no negligence on the part of defendant in allowing her bull to mix freely with cattle of other stock owners at the dipping tank . . ." It is a pity that this (the defendant's) herd-boy was not available to explain these words (his warning cry) . . .

In the case of *Mkhize versus Sikhakhane,* 1959, N.A.C. 3, this Court accepted as Native law in Natal that damages are not payable by the owner of an animal which has not been shown to have vicious propensities and which does damage to another's animal (or person) unless some specific act of negligence on the owner's part can be shown to have been the cause of the damage and the grounds of the present appeal are set out in the judgment of my brother Harvey .

I find myself unable to take the same view of the matter as was taken by the Commissioner. He found, rightly I think, that the bull did injure the heifer and accepted that its herd-boy had cried out a warning that it was going to injure the plaintiff's cattle. There was no evidence to the effect that it had been unduly excited, or disturbed by any previous untoward event and, in the absence of such evidence, he was correct in holding, as he seemingly did, that it had vicious propensities. That being so, I fail to understand how in view of Sitobela's warning shout it can be said on the evidence that these propensities were unknown to Sitobela. It may be a pity, as the Commissioner remarks, that Sitobela was not available to explain his words but in the absence of any satisfactory explanation of them by him—and it appears from the record that he could have been made available as a witness—one can only place their face value on the words and draw the inference that his warning shout was based on his knowledge of the animal's nature. As the bull was known by the defendant's herd-boy to be vicious it is a reasonable inference that that was also known to defendant.

The appeal should succeed with costs and the judgment of the Bantu Affairs Commissioner be altered to one of, "For plaintiff as prayed with costs".

For Appellant: Mr. W. E. White (instructed by Messrs. Cowley and Cowley).

For Respondent: Mr. S. H. Brien (instructed by Messrs. A. C. Bestall and Uys).

NORTH-EASTERN BANTU APPEAL COURT.

SIGOMFANA GASA AND OTHERS
vs.
MDOKWENI MNGADI

CASE No. 44 OF 1965.

PIETERMARITZBURG: 24th August, 1965. Before Yates, President, Craig and Harvey, members of the Court.

PRACTICE AND PROCEDURE.

Appeal—late noting—condonation—requirements.

Cases referred to:

Tauzeni versus Tsoki, 1964 (3), B.A.C. (S) 92.
Mtembu and another versus Zungu, 1953, N.A.C. (N-E) 52.
Mhlongo versus Dube and another, 1 N.A.C. (N-E) 137 (1949).
Nxele and Tulani versus Makalaba, 1955, N.A.C. (S) 7.

Appeal from the Court of the Bantu Affairs Commissioner, New Hanover.

Yates, President:—

The first matter to be dealt with is an application for the condonation of the late noting of the appeal.

Judgment was given in this case on the 12th January, 1965 and the last date for noting the appeal was the 5th February, 1965, i.e. 21 days and three Sundays later. (See *Tauzeni versus Tsoki*), 1964 (2) P.HR. 19.

According to the affidavits filed in support of the application the appellants interviewed their attorney on the 3rd February and instructed that an appeal should be noted so that if action had been taken at once the appeal could have been noted timeously. However, it was not until the 20th February that the affidavits were completed and the application for condonation of the late noting is dated 23rd February. There is nothing to indicate when it was received by the clerk of the court. Security for the costs of appeal was not lodged until 1st March which is therefore the date on which the appeal must be regarded as having been noted. See *Mtembu and Another versus Zungu*, 1953, N.A.C. (N.-E.) 52.

The supporting affidavits cover the period from the date of judgment until the 3rd February, 1965 only, and there is no explanation whatever for the further delay until the 1st March which must have been occasioned by the negligence and dilatoriness of the firm of attorneys concerned. Supporting affidavits must embrace the full period for which condonation is sought. See *Mhlongo versus Dube & Ano.*, 1 N.A.C. (N.-E.D.) 137 (1949).

The application therefore shows no good cause for granting relief, and it remains then to inquire whether on the merits of the proposed appeal good cause can nevertheless be shown; that is to say whether the appellants have a prospect of success. *Nxele and Tulani versus Makalaba*, 1955, N.A.C. (S) 7. Mr. Menge who appeared on behalf of the appellants was not able to advance any more cogent arguments than those contained in the written arguments submitted to the Bantu Affairs Commissioner and for the reasons stated by the latter in his able written judgment it is clear that there is no such prospect. The application for condonation of the late noting of the appeal is, therefore, refused with costs.

Craig and Harvey, members, concurred.

For Appellant: Adv. W. O. H. Menge, i.b. Leslie Simon & Co., Pietermaritzburg.

For Respondent: Mr. G. S. Clulow of Mason, Buchan & Co., Pietermaritzburg.

NORTH-EASTERN BANTU APPEAL COURT.

MKWANAZI vs. LANGA.

CASE No. 37 OF 1965.

PIETERMARITZBURG: 24th August, 1965. Before Yates, President, Craig and Harvey, Members of the Court.

COMMON LAW.

Damages for assault—quantam.

Summary: Defendant assaulted plaintiff and inflicted serious and permanent injury and was awarded damages under various heads totalling R294.82.

Held: That the amount awarded was inadequate and should be increased.

Cases referred to:

Hazis versus Transvaal & Delagoa Bay Investment Co. Ltd., 1939, A.D. 372.
Godlimpi versus Nqobela, 1961, N.A.C. (S) 36.
Hulley versus Cox, 1923, A.D. 234.
Mangcobo versus Mqatawa, 4 N.A.C. 34 (1919).
Norton and others versus Ginsberg, 1953(4), S.A. LR. 537.
Mvelase versus Njokwe and others, 1961, N.A.C. (N.E.) 46.

Appeal from the Court of the Bantu Affairs Commissioner, Klip River.

Yates (President):—

The plaintiff (present appellant) sued defendant (now respondent) in a Bantu Affairs Commissioner's Court for R1,000 damages made up as follows:—

Special Damages:—

	R	c
1. Hospital expenses	152	49
2. Specialist's fees	10	50
3. Loss of earnings	321	48

General Damages:—

Shock, pain and suffering, discomfort, disfigurement, permanent disability, loss of amenities of life and permanent reduction of earning capacity	515	53

for an assault on him with an iron pipe which broke his left femur and left him with a permanent limp.

In his plea the defendant denied the assault but the Acting Assistant Bantu Affairs Commissioner found that the assault had taken place and he awarded the plaintiff

	R	c
Loss of salary for one year	214	32
Hospital expenses (as agreed)	30	50
General damages	50	00
	R294	82

with costs.

Against this judgment plaintiff has appealed on the grounds that—

"1. The learned Acting Assistant Bantu Affairs Commissioner erred in holding that the Plaintiff was not entitled to recover the full amount of his lost earnings more particularly in that he incorrectly held that the Plaintiff would have been able to return to work sooner had it not been for inefficient medical treatment he received. There was no evidence that this was the case. On the contrary, the only medical evidence given refutes this possibility.

2. The learned Acting Assistant Bantu Affairs Commissioner erred in finding that there were factors mitigating plaintiff's damages.

3. The amount of damages awarded to plaintiff was quite inadequate in the circumstances."

The defendant was unrepresented at the hearing of the appeal.

In regard to the first ground of appeal Mr. Menge who appeared on behalf or plaintiff correctly pointed out that there was no evidence that plaintiff could have returned to work sooner than he did or that he received inefficient medical treatment. The specialist orthopaedic surgeon stated in examination-in-chief, "According to his story he was out of work for 1½ years and it would be fair to say that he could not have worked". And again under cross-examination, "He could actually have been working before February, 1964", i.e. 1½ years after the accident, so that, in my view, the Bantu Affairs Commissioner was wrong in holding that plaintiff could have returned to work sooner than he did and thereby have minimised his damages.

The onus was on defendant to show that plaintiff had not taken all reasonable steps to mitigate his loss of earnings. *Hazis versus Transvaal & Delagoa Bay Investment Co. Ltd.*, 1939, A.D. 372 at p. 388-9 and this he failed to do.

In fact, as a result of his injuries, plaintiff was out of work for 1½ years and was entitled to be recompensed for this period at a rate of R17.68 a month, i.e. in the amount of R318.24.

The hospital expenses and specialist's fees were admitted at an amount of R30.50 so that the only remaining question calling for consideration is whether or not the general damages awarded were inadequate.

The Commissioner when assessing the damages took into account that defendant had been provoked by plaintiff but even if there was provocation this does not assist the defendant. See *Godlimpi versus Ncobela,* 1961 N.A.C. (S) 36 at p. 38 and the authorities were cited. Provocation can only affect the quantum of damages for contumelia and not that for pain and suffering, loss of amenities and disability which form the basis of the claim for general damages in the instant case. As a result of the blow plaintiff suffered considerable pain and was detained in hospital for some time where he underwent two operations. His left leg is now one inch shorter than his right; there is now virtually no movement in the knee joint and although he can walk without aid, he will always have a limp. There has been a 3-inch wasting of the thigh. As a result of this permanent disability he will never again be able to undertake hard manual labour.

In view of the difficulty and uncertainty necessarily involved in the assessment of general damages, particularly in bodily injury cases, it is helpful and instructive to have regard to awards of damages made by courts in comparable cases. See *Hulley versus Cox,* 1923 (A.D.) 234 at p. 246 and this the Bantu Affairs Commissioner has borne in mind, pointing out in his reasons for judgment that R100 was awarded by the Bantu Appeal Court for the loss of an eye. See *Mangcobo versus Mqatawa,* 4 N.A.C. 34, 1919. That case, however, was heard very many years ago and, apart from anything else, the steady decrease in the value of money which has taken place over the years is a factor which should be taken into account. See *Norton and Others versus Ginsberg,* 1953(4) S.A. 537 at p. 541 and 551.

In a somewhat similar case to the instant one, viz. *Mvelase versus Njokwe and Two Others,* 1961, N.A.C. (N.-E.) 46 where defendant suffered a severe head injury and was left with a permanent limp, damages of R120 were, awarded. In *Godlimpi's* case supra R300 was awarded to defendant who suffered considerable pain for a period of six months, who's speech was affected and whose right arm and leg were slightly disabled as a result of a blow with a stick.

In the circumstances of the present case I consider that an award of R100 as suggested by Mr. Menge for damages for pain and suffering would be adequate.

In regard to the claim for loss of earnings which was included in the amount claimed under the head of general damages, Mr. Menge contended that plaintiff was actually entitled to an amount of R780 under this head. Plaintiff was 34 years old and stated that he expected to work until he was 60, i.e. another 26 years. His monthly income had dropped from R17.68 to R15.00 — at a rough estimate say R2.50 a month or R780 for the full period. However, he did not press for this amount but accepted the assessment of loss of income at the rate suggested by plaintiff's attorney in the court *a quo,* i.e. R1.00 a month and argued that on this basis he should receive R312.00 (26 x 12).

However, accepting that plaintiff's income had dropped by R12 a year an amount of R200, wisely invested at 6 per cent would bring in this amount; and, taking all aspects into consideration, this seems to be a fair award.

In the circumstances, then, the appeal is allowed with costs and the judgment of the Commissioner is altered to read:—

	R	c
"For plaintiff for loss of earnings	318	24
Hospital and medical expenses	30	50
Pain and suffering	100	00
Loss of future earnings	200	00
	R648	74

and costs of suit".

Craig and Harvey, Members concurred.

For Appellant: Adv. W. O. H. Menge, i.b. Christopher, Walton & Tatham, Ladysmith.

For Respondent: In default.

NORTH-EASTERN BANTU APPEAL COURT.

HLONGWANE AND HLONGWANE vs. NOMAFAMADLALA.

CASE No. 28 OF 1965.

PIETERMARITZBURG: 24th August, 1965. Before Yates, President, Craig and Harvey, Members of the Court.

MESSENGER OF THE COURT.

PRACTICE AND PROCEDURE.

Messenger of Chief's Court — liability to return attached cattle—damages. Appeal not noted timeously—condonation—summons disclosing no cause of action—claims vague and embarrassing.

Summary: Plaintiff sued defendants for the return of cattle allegedly wrongfully attached, expenses incurred and "use of two cattle". First defendant was messenger of a Chief's Court and in that capacity attached cattle in execution of a judgment of that court and parted with possession of them. The summons did not disclose on what grounds second defendant was sued and the other claims against first defendant were vague and embarrassing for want of particularity. The appeal was not noted timeously due to misinterpretation of the Rules.

Held: that first defendant could not be sued for the return of cattle with the possession of which he had parted.

Held: that first defendant could be sued for damages if the attachment were wrongful and unlawful but that the other claims against him were vague and embarrassing.

Held: that the appeal had not been noted timeously but as the failure to lodge an application for condonation was due to misinterpretation of the Rules by the Registrar and appellant's attorney the appeal should be treated as if it had been noted timeously.

Held: that as the summons disclosed no cause of action against second defendant it should have been dismissed in so far as it affected him.

Cases referred to:

Nqcamu versus Majozi, 1959, N.A.C. 74.
Tauzeni versus Tsoki, 1964, (3), B.A.C. 92.
Mdumba versus Ziwedu, 1924, N.H.C. 47.

Works referred to:

Stafford and Franklin's "Principles of Native Law and the Natal Code", page 252-253.

Appeal from the Court of the Bantu Affairs Commissioner, Bergville.

Craig, permanent Member:

Judgment in this case was delivered on the 12th January, 1965. On the same day the attorney for the defendants made written application for a copy of the record and for the Bantu Affairs Commissioner's reasons for judgment but the fee prescribed by Bantu Appeal Courts' Rule 2, was not paid until 24th February, 1965. The application was, thus, not properly before the Commissioner until that date and he furnished his reasons for judgment forthwith. On 10th March 1965 a notice of appeal and security were lodged, i.e. on the forty-ninth day after judgment was delivered.

The then Registrar of this Court notified the Clerk of Court concerned that the appeal appeared to have been noted late and suggested that appellant's attorney lodge an application for condonation. The latter, in reply, submitted that as the appeal had been noted within fourteen days of 24th February, 1965, on which date the Commissioner furnished his reasons, the matter was in order. Unfortunately, the Registrar accepted this submission and informed the attorney that an application for condonation need not be lodged as the appeal had been noted timeously.

It is clear that both the attorney for the appellants and the Registrar erred in their interpretation of Bantu Appeal Courts' Rules 2 (1) and 4 and both overlooked the decisions in the cases of *Ngcamu versus Majozi* d/a 1959, N.A.C. 74 and *Tauzeni versus Tsoki* 1964 (2) P.H.—R 19 [this latter case will in due course appear at 1964 (3), N.A.C. 92].

With reluctance but because it would not be in the interests of justice to penalise the parties for oversights and misinterpretations for which they were not responsible this court decided to proceed with the matter as if the appeal had, in fact, been timeously noted.

According to the face of the summons the plaintiff claimed from the two defendants, " two head of cattle, etc. See back hereof " and on the reverse of that document appears the following:—

" Plaintiff's claim is for the return of two head of cattle wrongfully taken in execution of a Chief's judgment and for an amount of R10 being personal expenses in making complaints to B.A. Commissioner and use of the two head of cattle:—

1. The parties hereto are Natives as defined in the Native Administration Act No. 38/27.

2. The plaintiff is Nomafa Madlala duly assisted by Hlabeyakhe Manzini (duly appointed as such by the Bantu Affairs Commissioner, Bergville).

3. Plaintiff was defendant in an action brought by second defendant herein before the Chief's court.

4. Judgment was given against plaintiff herein (defendant in the Chief's court) in default and plaintiff paid the judgment debt.

5. Despite the fact that judgment debt was paid, first defendant herein (in his capacity as Messenger of the Chief's court) wrongfully attached two head of cattle from plaintiff.

6. Wherefore plaintiff prays for judgment in her favour for the return of the two head of cattle, R10 personal expenses, and costs of this action."

The defendants filed a joint plea of —

" Save as herein admitted and not otherwise, defendants herein hereby enter appearance to defend this action whereto they plead as follows:—

1. Paragraphs 1, 2 and 3 are admitted.

2. Second defendant denies that plaintiff paid the judgment debt in full, but states that plaintiff only paid R20 the value of one beast.

3. Defendants state that the one beast attached was the beast still owing by plaintiff as the amount paid by plaintiff as set out in paragraph 2 above was the value of one beast. The second beast is impounded by the messenger until he recovers his costs.

4. First defendant states that he attached the beast mentioned in 3 above on instructions from the Chief.

Wherefore defendants pray that this Honourable Court shall dismiss this action with costs."

After hearing evidence the Bantu Affairs Commissioner gave judgment of:—

" For plaintiff against No. 2 for return of two head of cattle taken in execution by defendant No. 1 or their value R28. Second defendant to pay costs."

Appeal to this court was noted on the following grounds:—

"1. Dat die Edelagbare Bantoesakekommissaris verkeerdelik bevind het dat —

(a) Moses Zondo verweerder se agent was; en

(b) dat betaling van die bees se verkoopprys deur eiseres, aan Moses Zondo, verweerder gebind het om die verkoopprys te ontvang in plaas van die bees."

This Court *mero motu* raised the point that the summons disclosed no cause of action against No. 2 defendant and that while he may from his own knowledge have been aware of what plaintiff purported to claim from him the Bantu Affairs Commissioner was not, and accordingly, should not have proceeded with the hearing on the pleadings as they stood.

The reverse of the summons, apart from alleging that "plaintiff was defendant in an action brought by second defendant herein before the Chief's court" does not mention the latter again. It makes no averments as to how a claim for two head of cattle, R10 and "use of the two head of cattle" arose against him and no prayer for judgment against him.

In my view the summons was a nullity as far as it purported to make claims against second defendant. Though the evidence served to clear up the issue to some extent the serious deficiencies in the particulars should not have been condoned, as I presume they were, and in the absence of proper amendment the Bantu Affairs Commissioner should have dismissed the summons as far as it purported to affect second defendant.

The court, *mero motu,* raised the point that the Commissioner gave no judgment, as he should have done, in respect of the claim against the first defendant and the joint notice of appeal does not indicate what the defendant's attorney had in mind when he prepared it.

Against this defendant there was a claim for two head of cattle, allegedly wrongfully attached by him, R10 personal expenses "in making complaints to B.A. Commissioner" and "use of two head of cattle". The first defendant did not plead to these two latter items.

It is common cause that he is a messenger of the Chief's court and that he attached the cattle concerned by virtue of a judgment of that court. In such circumstances he may not be sued for the return of the one beast which has passed out of his hands into those of the second defendant *vide Mdumba versus Ziwedu,* 1924, N.H.C. 47 and *Stafford & Franklin,* at pages 252-253.

First defendant neither gave nor led testimony in the court below. In regard to the second beast attached he pleaded that it "is impounded by the Messenger until he recovers his costs" and it seems he made an unsworn statement in the Court *a quo* that he had sold it for R8. It would be incumbent on the plaintiff to establish, *inter alia,* the illegality of attachment in order to derive compensation for this beast. There is, for instance, nothing on record to indicate that this defendant was aware of any of the alleged payments in cash or kind. It seems that other evidence is available to plaintiff, who was unrepresented in the Commissioner's court and first defendant should have been absolved in respect of this portion of the claim.

The two "items" referred to earlier might, conceivably, fall under the heading of damages *vide Mdumba's case supra* but both are vague and embarrassing of want of particularity and detail in the summons and plaintiff gave no evidence regarding them.

In my view the appeal must succeed but as the points on which it turns were not raised in the notice of appeal there should be no order as to costs in this court.

The appeal, is allowed with no order as to costs and the judgment of the Bantu Affairs Commissioner is altered to read:—

"First defendant is absolved from the instance with the costs incurred by him in defending this action. In so far as it relates to second defendant the summons is dismissed with the costs incurred by him in defending this action."

Yates, President and Harvey, Member, concurred.

For Appellants: Mr. A. P. van der Merwe, Winterton.

For Respondent: In default.

NORTH-EASTERN BANTU APPEAL COURT.

SHAZIWE SIBIYA vs. NICHOLAS ZWANE.

B.A.C. CASE No. 53/65.

ESHOWE: 6th October, 1965: Before Yates, President; Craig and Colenbrander, Members of the Court.

PRACTICE AND PROCEDURE.

Chief's and Bantu Affairs Commissioner's Courts—change of plaintiff permitted on appeal to Commissioner's Court—effect Chief's written record—criterion—Chief's reasons for judgment not before court—alterations to process by Court.

Summary: In a Chief's Court one Gadile Sibiya sued Nicholas Zwane for a beast. On appeal the Bantu Affairs Commissioner permitted, with the consent of defendant, the substitution of one Shaziwe Sibiya as plaintiff and after hearing evidence he dismissed the appeal and confirmed the Chief's judgment. The Chief's reasons for judgment had not been called for and were not before the Bantu Affairs Commissioner's Court.

Held: That the Bantu Affairs Commissioner acted irregularly in permitting a change of plaintiff in the circumstances of this case.

Held: That the substitution in the Bantu Affairs Commissioner's Court did not affect the position in the Chief's Court where, according to the Chief's Written Record which is the criterion, Gadile remained plaintiff.

Held: That the Bantu Affairs Commissioner acted irregularly in proceeding with the appeal in the absence of the Chief's reasons for judgment.

Held: That alterations should not be made to the wording of process.

Regulations referred to:

10, 11, 12 Chief's Civil Courts 53(12) Bantu Affairs Commissioner's Court.

Cases referred to:

Kunene versus Madondo, 1955, N.A.C. 75 *Maluthla versus Kalankomo,* 1955, N.A.C. 95.

Works referred to:

"A Digest of South African Native Case Law" by Warner —paragraphs 266, 270 and 433.

Appeal from the Bantu Affairs Commissioner's Court at Nqutu.

Craig, permanent member:

According to the Chief's written record which is the criterion in such cases *vide* Warner's "Digest" paragraph 270, one Gadile Sibiya sued defendant on a claim recorded as "I claim one head of cattle from the defendant to replace the one I purchased from him for R32·00 which beast died and the defendant skinned without my consent".

To this defendant pleaded "I reported to the plaintiff that his beast was sick on four occasions. Plaintiff came and caused the beast to suck medicine. When the beast died I again reported to the plaintiff. He did not come and two days after its death I skinned it".

The Chief's judgment reads: "For plaintiff for one head of cattle and costs R5·80. Cost of appeal R0·25 cents".

On appeal the Bantu Affairs Commissioner entered judgment of "Appeal dismissed with costs. Chief's judgment altered to read: "For plaintiff for one head of cattle or its value of R32·00 and costs R5·80."

An appeal to this Court was noted out of time by defendant on general grounds and it was followed up by an application for condonation and for leave to amplify the notice of appeal by the addition of the following grounds:—

(1) The Court erred in proceeding with the appeal in the absence of the Chief's reasons for judgment.

(2) The Court erred in deleting the name of Gadile as plaintiff in the Chief's Court, and substituting therefor the name of Shaziwe Sibiya as plaintiff.

(3) The plaintiff admitted that the beast he claimed died and was reported, consequently the onus shifted onto him, to prove that the beast died as the result of the defendant's negligence, and there is no evidence of negligence on record on the part of the defendant.

(4) The Court erred in recalling plaintiff to give evidence after both parties had closed their cases.

The ground that defendant had no funds with which to note an appeal is unacceptable *vide* the cases quoted in Warner's "A Digest of South African Native Case Law" in paragraph 433. Standing alone the application would not succeed and defendant must bear any costs occasioned by it but in the light of the additional grounds of appeal, leave to add which was granted, which raised points which this Court would have felt constrained to raise *mero motu* the prospects of success on appeal were such that condonation was granted. At the hearing of the appeal in terms of Chiefs' Civil Courts Regulation 12(4) i.e. a hearing or retrial as of a case of first instance the Bantu Affairs Commissioner permitted, with the consent of defendant, the substitution of one Shaziwe Sibiya as plaintiff in his court. He did not, nor was he entitled to, make a similar substitution in respect of the Chief's Court. If he, in fact, believed that that effect had been achieved he was under a misapprehension. There was nothing before him to indicate that the Chief had recorded the case

wrongly so that the principles and requirements enunciated in the case of *Kunene versus Madondo* 1955, N.A.C., 75 are inapplicable. Indeed, it is clear that Gadile did figure and remains as plaintiff in the Chief's Court though it subsequently transpired in the court *a quo* that that he did so because Shaziwe "was sick and could not attend the Chief's Court". There is nothing to show that the Chief was aware that Cadile sued in any but his personal capacity.

In both courts the same point was in issue and the ultimate result was that the Chief adjudged a case between Gadile and defendant and the Commissioner did so in respect of a case between Shaziwe and defendant on this point. The Commissioner then dismissed the appeal against the Chief's judgment in favour of Gadile. This is clearly an untenable position.

If the Chief's judgment were confirmed and the beast was handed over to Gadile he could resist any claim by Shaziwe, who is apparently the actual owner, on the ground that the beast was his by virtue of such judgment.

Immediately he became aware that Gadile had no right to sue for the beast in his own name the Commissioner should have stopped the hearing in his court and allowed the appeal and altered the Chief's judgment to one: "For defendant with costs".

This brings me to the first additional ground of appeal. The Chief's "Reasons for Judgment" might have cleared up the points of Gadile's capacity to sue and his rights, if any, in and to the beast concerned but the record is silent in regard to whether there has been any compliance with Chiefs' Courts Regulations Nos. 10, 11 and 12. The Chief's "Reasons" were not before the Commissioner and it was an irregularity to proceed with the hearing without them except in certain circumstances [see paragraph 266 of Warner's "Digest" (*supra.*)]

The Commissioner must refrain from altering the wording on process before him as he did by deleting the name Gadile and writing in "Shaziwe" on the "Notice of Hearing of Appeal" (Form B.A. 503). It is an irregularity to do so. Only a note of amendments applied for and allowed or disallowed must appear in the body of the record though there could be no objection to his making a reference on such process to the page concerned of the record.

For the above reasons alone the appeal must succeed. The road is still open to Shaziwe to sue in his own name should he deem fit despite the substance apparent in the third ground of appeal.

With regard to the fourth additional ground attention is directed to Bantu Affairs Commissioner's Court Rule No. 53(12) and the case of *Malufahla versus Kalankomo,* 1955, N.A.C. 95.

In the result the appeal is allowed with costs, which shall not include costs of application for condonation and the Bantu Affairs Commissioner's judgment is set aside and for it is substituted "The appeal is allowed with costs and the Chief's judgment is altered to read "For defendant with costs".

Yates, President and Colenbrander, member concurred.

For appellant: Mr. W. E. White i.b. Uys, Boshoff & Kleyn, Vryheid.

For respondent: In default.

NORTH-EASTERN BANTU APPEAL COURT.

JEREFANA SHANDU vs. NICHOLAS ZWANE.

B.A.C. CASE No 62 OF 1965.

ESHOWE, 8th October, 1965: Before Yates, President, Craig and Colenbrander, Members of the Court.

DAMAGES.

Damages—destruction of crops—proof of loss.

Summary: A Chief awarded Plaintiff damages against Defendant for loss suffered as a result of destruction of crops allegedly by the latter's cattle. The Chief hazarded a guess at what loss had been sustained and made an award. On appeal the Bantu Affairs Commissioner confirmed the award as he regarded it as a reasonable one.

Held: That neither court had any evidence on which to base an award, that the appeal against the Chief's judgment should have been allowed and his judgment altered to one dismissing the claim.

Appeal from the Court of the Bantu Affairs Commissioner at Empangeni (Lower Umfolosi).

Yates, President:

This case emanates from a Chief's Court where plaintiff (present respondent) sued defendant (present appellant) for R120 being damages for mealies destroyed by defendant's cattle. The latter denied that his cattle had caused the damage. The Chief awarded plaintiff R40 plus R3 costs and an appeal to the Bantu Affairs Commissioner's Court was dismissed with costs on March, 1965. Against this judgment an appeal was noted on 7th June, i.e. two months late.

The explanation for the delay in noting the appeal as set out in the affidavit accompanying the application for condonation is that the applicant "became ill suffering from sore legs". The application was not opposed and in the circumstances was granted.

The grounds of appeal are:—

"(*a*) Plaintiff failed to prove trespass or, alternatively, that the trespass was due to the negligence or wilfulness of appellant, or his servants.

(*b*) Plaintiff failed to prove patrimonial loss to the extent claimed or at all."

In regard to the first ground of appeal it is abundantly clear from the evidence that it was defendant's cattle that trespassed on plaintiff's mealie land and that the latter had taken all the necessary action that was required from him in these circumstances. After finding the cattle trespassing in his land he drove them directly to defendant's kraal but as the latter was not there he left them with defendant's wife and mother and reported the matter to the induna. The latter sent the tribal constable to the defendant to instruct him to meet them at the land to inspect the damage. However, he did not obey the summons and plaintiff and the induna inspected the land the next day in his absence.

It is true, as pointed out by Mr. Brien, who appeared for on behalf of the defendant, that the plaintiff and the induna differed in their estimate as to the size of the land but in the absence of evidence that they knew the size of a morgen the discrepancy is not of any moment.

Unfortunately, however, no evidence whatever was led as to the amount of damage caused nor how the Chief arrived at his figure of R40. The plaintiff was unrepresented in the Court below and in this Court and it is a matter for regret that the presiding officer in the court *a quo* did not point out this omission to him or question the plaintiff and his witness more closely in this regard.

In the absence of this evidence the appeal must succeed on the second ground and the appeal is allowed with costs and the Bantu Affairs Commissioner's judgment altered to read "The appeal is allowed with costs and the Chief's judgment altered to read 'The claim is dismissed with costs.'.".

Craig and Colenbrander, members, concurred.

For Appellant: Mr. S. H. Brien i.b. Davidson & Schreiber, Empangeni.

For Respondent: In person.

NORTH-EASTERN BANTU APPEAL COURT.

ABSOLUM ZULU vs. MANGOBOBANA ZULU (No. 4) AND THREE OTHERS.

B.A.C. CASE No. 57/65.

ESHOWE, 8th October, 1965. Before Yates, President, Craig and Colenbrander, Members of the Court.

PRACTICE AND PROCEDURE.

Default judgment—refusal to rescind—calling of names of defendants—written request for default judgment—non-service of summons—judgment void ab origine—*lapsing of summons.*

Summary: Plaintiff issued summons against four defendants and it was served on only one of them. A default judgment was given against all four and a subsequent application for rescission by the only one on whom the summons had been served was refused.

Held: The Clerk of Court had not complied with the Rule regarding the calling of the names of defendants and the judgment was void *ab origine*.

Held: The fact that a copy of the summons was served on only one of the defendants a judgment embracing all four of them was void *ab origine*.

Held: That apart from other considerations, the default judgment should have been rescinded as there had been no written request for default judgment.

Held: That all the proceedings subsequent to summons were a nullity and the summons must, accordingly, be regarded as having lapsed.

Regulations referred to: Bantu Affairs Commissioners' Courts: Rules 41 and 92.

Cases referred to:
Shongwe versus Mhlongo, 1953, N.A.C. 201.

Works referred to:

"The Civil Practice of the Magistrates' Courts in South Africa", 6th edition, by Jones & Buckle, page 443.

Appeal from the Bantu Affairs Commissioner's Court at Louwsburg.

Craig, Permanent Member.

The plaintiff issued summons against the four defendants claiming from them, jointly and severally, R1,118 as damages for destroying plaintiffs property by fire. The fourth defendant was joined, presumably by virtue of section 141 of the Natal Native Code, because he is the kraalhead of the other three and they were "in residence" when the delicts were committed.

On 26th November, 1963, the last day for entry of appearance, the Clerk of the Court endorsed the record purporting to show that he had complied with Bantu Affairs Commissioners' Courts Rule No. 41 (1) in that he "called out the name of the defendant . . . in front of the Court House in a loud and clear voice but there was no response."

By notice, dated 2nd December, 1963, plaintiff's attorney notified the Clerk of Court that this case had been set down for hearing on 13th December, 1963, but there is nothing on record as to what transpired on that date.

By notice, dated 16th January, 1964, plaintiff's attorney informed the Clerk of Court that the case had been re-instated and set down for hearing on 4th February, 1964, and on the latter day the four defendants were absent and unrepresented and the Commissioner then recorded plaintiff's evidence and entered a default judgment of "Vonnis vir eiser vir R1,105 met koste van geding."

An application, dated 5th August, 1964, for condonation of the delay in making it and for rescission of this judgment was lodged and in that the applicants gave notice that they would use an annexed affidavit by defendant No. 4 in support of their application. After postponement the matter came before the Court on 6th May, 1965, when the evidence of defendants Nos. 3 and 4 was heard and the Bantu Affairs Commissioner gave judgment dismissing the application with costs.

An appeal to this Court against the judgment has been noted on grounds that:—

(1) That the judgment is against the evidence and contrary to law.

(2) That the appellant/applicant showed that he was not in wilful default.

(3) That respondent had not adequately proved his damages.

The proceedings in this case are open to serious criticism and this Court, *mero motu,* raised certain legal points which are fatal to the cesisions recorded. The first ground of appeal does contain an assertion that the judgment is contrary to law but does not specify in what respects so that portion of it must be ignored.

The Commissioner's judgment does not specify that it was against all four defendants jointly and severally the one paying the others to be absolved but as the summons indicates that they were sued jointly and severally it will be presumed that he intended to impose a similar liability.

The record is silent as to whether or not plaintiff or his attorney made verbal application at the start of proceedings on 4th February, 1964, for default judgment. The nearest approach to such an application on record appears at the end of plaintiff's testimony where he is recorded as having said "Ek vra die agbare Hof om my skade toe te ken vir die verlies wat ek gehad het." But, "A written request (i.e. for a default judgment) is essential; a default judgment granted in the absence of it will be set aside on application" see Rule 41 (2) of the Bantu Appeal Courts and Jones and Buckle's "The Civil Practice of the Magistrates' Courts in South Africa" 6th edition at page 443. Plaintiff's attorney erred in leading evidence and the Commissioner erred in accepting and recording it in the absence of written request. Apart from other considerations which will now be dealt with a rescission should have been granted.

A judgment against defendant 1, 2 and 3 was not competent as the summons was never served on them by any of the modes provided for in the Rules. Mr. Brien, who appeared for the respondent (plaintiff) in this Court, submitted that defendant 4's affidavit in support of the rescission application and his evidence showed that there had been such service. But this submission must fall away as the statements by No. 4 that he and the other defendants had been "summoned" was made six months and more after judgment was given. In any event defendant No. 3 testified that there had been no service on him. At the time he gave judgment the Commissioner had before him only the Messenger of Court's return of service and this indicates that a copy of the summons (no mention was made of copies for the others) was served on the kraalhead defendant 4 "as he informed me that defendants 1, 2 and 3 were not at home. It would be idle for this Court to speculate whether or not they were still at the address given as theirs by the plaintiff in his affidavit of 2nd May, 1963, i.e., the Vryheid gaol.

In my view, the judgment of 4th February, 1964, embracing, as it did, all the defendants including No. 4 who was joined solely because Nos. 1, 2 and 3 were inmates of his kraal, was void *ab origine* and should have been rescinded without ado.

Further the endorsement by the Clerk of Court does not establish a compliance with Bantu Affairs Commissioners' Courts Rule 41 (1). The endorsement does not specify which defendant's name was called nor why those of the others were not called. Because of these defects too the default judgment was void *ab origine* vide *Shongwe versus Mhlongo,* 1953, N.A.C. 201.

In view of these circumstances the court gave judgment allowing the appeal with costs and altering the Bantu Affairs Commissioner's judgment to one granting rescission of the default judgment of 4th February, 1964.

Mr. White, for appellant, then submitted that the irregularities manifest in the proceedings brought the summons within the purview of Rule 92. Despite the counter-submissions of Mr. Brien this Court was of the view that Mr White was correct and that the proceedings on the merits subsequent to summons were a nullity and that the summons itself must be regarded as having lapsed.

In the result the Appeal is allowed with costs and the Bantu Affairs Commissioner's judgment is altered to read "Aansoek om kondonasie en tersydestelling gehandhaaf met koste." The proceedings on the merits subsequent to summons are declared a nullity and are set aside and the summons is ruled to have lapsed.

Yates, President and Colenbrander, Member, concurred.

For Appellant: Mr. W. E. White i/b H. L. Myburgh, Vryheid.

For Respondent: Mr. S. H. Brien i/b F. Tromp, Vryheid.